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Supreme Court, U.S.
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No. 96-12

In the Supreme Court of the United States

October Term, 1995

Ilene Thurman Hunter, on behalf of Kathy Michelle Hunter, Claude Kenneth Hunter, Jr., Michael Christopher Hunter, Melissa Ilene Hunter, and Donovan Blaine Hunter,
Petitioners,

v.

Knoll Rig and Equipment Manufacturing Company, Ltd., (a Subsidiary of Dreco Group of Companies, Ltd.) and National Union Fire Insurance Company of Pittsburgh, PA.
Respondents,

v.

Fidelity and Casualty Company of New York,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this wrongful death-products liability case, the Fifth Circuit reversed a jury verdict in favor of petitioners, the surviving family of a derrickman who was crushed to death by 110,000 lb. of pipe that swarmed out of a racking board on a mobile rig manufactured by respondent KREMCO. Although KREMCO did not specify any grounds in support of two blanket Motions for Judgment as a Matter of Law made prior to the verdict, the Fifth Circuit held that the Trial Court erred in refusing to grant judgment as a matter of law on the issue of the reasonably anticipated use of the racking board under the Louisiana Products Liability Act, on the grounds that no reasonable jury could have found that the use of the racking board (which was being used to rack pipe in a common, albeit less than perfect, manner) was a use reasonably anticipated by the manufacturer. Thus, and despite the fact that other grounds existed under Louisiana law to support the verdict, including the existence of safer alternative designs and the existence of defective latches on the board, the Fifth Circuit reversed the jury verdict and rendered judgment in favor of defendants.

The Fifth Circuit's decision reversing the jury's verdict in favor of petitioners presents the following questions:

1. Whether the Fifth Circuit's decision granting judgment as a matter of law on an issue that was not specifically raised in pre-verdict motions for judgment as a matter of law is compatible with the Seventh Amendment to the United States Constitution; Fed. R. Civ. P. 50(a)(2); this Court's decisions in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947) and *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 68 S.Ct. 246, 92 L.Ed. 177 (1948); and decisions of the Circuit Courts that

require pre-verdict motions for judgment as a matter of law to specify the grounds, facts and law in support of the motions.

2. Whether the Fifth Circuit's decision, in which the Court rendered judgment as a matter of law on a factual issue on which there was abundant evidence in plaintiffs' favor and substituted its factual findings for those of the jury, is consistent with the Seventh Amendment of the Constitution, the standards of review set forth by this court in *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) and innumerable decisions of the Circuit Courts, and acceptable judicial procedure.

3. Whether the Fifth Circuit's decision, which reinstates the doctrine of contributory negligence as a bar to recovery in products liability suits in federal courts in Louisiana, contrary to Louisiana Supreme Court decisions and Louisiana law, is compatible with this Court's decision in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and the Rules of Decision Act, 28 U.S.C. §1652.

4. Whether the Fifth Circuit's decision, which conflicts with the terms of the Louisiana Products Liability Act, with scholarly commentary on the Act and with decisions of Louisiana courts on the issue of reasonably anticipated use, is compatible with this Court's decision in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and the Rules of Decision Act, 28 U.S.C. § 1652.

5. Whether the Fifth Circuit's decision, which misapplied settled Louisiana Products Liability law in failing to recognize that other grounds (including the findings of safer feasible alternative designs and defective latches) warranted the imposition of liability despite a finding of reasonably unanticipated use of the racking board, is compatible with this Court's decision in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and the Rules of Decision Act, 28 U.S.C. § 1652.

6. Whether the Fifth Circuit's decision, which will cause disparate results depending on whether products liability suits are litigated in Louisiana state or federal courts, is compatible with this Court's decision in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and the Rules of Decision Act, 28 U.S.C. § 1652.

7. Whether the Fifth Circuit's decision, which will promote removal of state court tort suits by defendants and unduly burden the federal courts with garden variety products liability suits, is consistent with sound policy, this Court's decision in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and the Rules of Decision Act, 28 U.S.C. § 1652.

8. Whether the Fifth Circuit's refusal to certify important questions on the interpretation of the Louisiana Products Liability Act to the Louisiana Supreme Court, as plaintiffs requested, contravenes this Court's decision in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and the Rules of Decision Act, 28 U.S.C. § 1652.

9. Whether the Fifth Circuit erred in refusing to find in favor of petitioners on their assignments of error on appeal relating to the proper allocation of liability and damages under Louisiana law.

RULE 14(b) STATEMENT

All parties in the Court of Appeals are listed in the caption of this case. Petitioners are not corporate filers, thus there are no parent or subsidiary companies to be listed under Rule 29.6.

CERTIFICATE OF INTERESTED PERSONS

The following persons and entities have an interest in this suit:

1. Ilene Thurman Hunter, individually and on behalf of the minor children, Kathy Michelle Hunter, Claude Kenneth Hunter, Jr., Michael Christopher Hunter, and Melissa Ilene Hunter, Plaintiffs.

2. Donovan Blaine Hunter, Plaintiff

3. Knoll Rig & Equipment Manufacturing Co., Ltd., A Subsidiary of Dreco Group of Companies, Ltd., Defendant

4. National Union Fire Insurance Co. of Pittsburgh, PA, Defendant

5. Fidelity & Casualty Co. of New York, Intervenor-Plaintiff

6. Layne Royer, R. LAYNE ROYER, LTD., and Allen M. Posey, Jr., Attorneys of Record for Ilene Thurman Hunter, individually and on behalf of the minor children, Kathy Michelle Hunter, Claude Kenneth Hunter, Jr., Michael Christopher Hunter, and Melissa Ilene Hunter, and Donovan Blaine Hunter

7. Ronald E. Raney, LUNN, IRION, JOHNSON, SALLEY & CARLISLE, Attorney of Record for Knoll Rig & Equipment Manufacturing Co., Ltd. and National Union Fire Insurance Co. of Pittsburgh, PA

8. S. Price Barker, COOK, YANCEY, KING & GALLOWAY, Counsel of Record for Fidelity & Casualty Co. of New York, Intervenor-Plaintiff

9. Phillips Petroleum Company

10. Mosley Well Service, decedent's employer.

11. William Kaufman, Attorney for Phillips Petroleum Company

12. Sydney Nelson, Attorney for Mosley Well Service

13. All present and future product liability claimants asserting a claim under the LPLA

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No. 96-12

In the Supreme Court of the United States

Ilene Thurman Hunter, et al.
Petitioners,
v.
Knoll Rig and Equipment Manufacturing Co., Ltd., et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Ilene Thurman Hunter, on behalf of Kathy Michelle Hunter, Claude Kenneth Hunter, Jr., Michael Christopher Hunter and Melissa Ilene Hunter, and Donovan Blaine Hunter, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Fifth Circuit Court of Appeals (App. A-1) is reported at 70 F.3d 803. The Fifth Circuit's Per Curiam Opinion on Denial of Rehearing (App. A-38) is reported at 80 F.3d 136. The Ruling of the United States District Court for the Western District of Louisiana Denying Defendants' Motion for Judgment as a Matter of Law (App. A-26) is unreported.

JURISDICTION

The Opinion of the United States Fifth Circuit Court of Appeals was rendered on November 29, 1995. A timely petition for rehearing was denied on March 28, 1996 (App. A-38). The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VII.
The Rules of Decision Act, 28 U.S.C. § 1652.
Federal Rule of Civil Procedure 38(a).
Federal Rules of Civil Procedure 50(a)(1) and 50(a)(2).
Louisiana Products Liability Act, La. R.S. 9:2800.51, *et seq.*
Louisiana Civil Code Article 2323.
(See Appendix H for Text)

STATEMENT OF THE CASE

Claude Hunter, Sr., a derrickman on a mobile oil rig, was crushed to death when 110,000 pounds of pipe swarmed out of a racking board on the rig, pinning him to the mast. Petitioners, the surviving family members of Mr. Hunter, brought the instant wrongful death-products liability suit against respondent, Knoll Rig & Equipment Manufacturing Company, Ltd., a Subsidiary of Dreco Group of Companies, Ltd. ("KREMCO") the manufacturer of the mobile rig and racking board, and its insurer, National Union Fire Insurance Co. of Pittsburgh, PA. Mr. Hunter's survivors alleged, pursuant to the Louisiana Products Liability Act, La. Rev. Stat. § 9:2800.51, *et seq.* (the "LPLA"), that Hunter's death was proximately caused by three unreasonably dangerous characteristics of the racking board manufactured by KREMCO, including: (1) defective design; (2) lack of warnings and instructions; and (3) breach of an express warranty.

After this action was filed against KREMCO in Louisiana state court, KREMCO removed it to federal district court based on diversity jurisdiction, 28 U.S.C. § 1332. Prior to trial, damages were stipulated at $1,384,187.00, and during a five day jury trial, the parties proceeded to try the case on liability alone.

The evidence at trial showed that on August 29, 1990, Claude Hunter and several other employees of Mosley Well Service were pulling tubing out of an existing well. Hunter's job as a derrickman required him to pull back the top end and vertically rack approximately 60 foot stands of tubing in the racking board attached to the mast (portable derrick) about 55 feet above the ground. Hunter was following his supervisor's order to tie the pipe back to the rear handrail using sash cord to secure it in the racking board (Tr. 102), which was a common practice when using racking boards that did not have retainers or keepers. The movement or vibration of the racking board during normal operations caused the rope-secured pipe to jerk against the handrail (Tr. 468-469, 871-873) and overload the latches, allowing the tubing to swarm out of the racking board and fall across the mast (Tr. 452). Hunter was killed when approximately 143 stands of 3 ½ inch tubing shifted or swarmed out of the racking board and fell toward or across the mast, pinning and trapping Hunter between the tubing and the side of the mast.

KREMCO designed and sold only one type of end-raked (fingers to the back of the racking board) racking board, with no retainers or keepers to hold pipe in the racking board (Tr. 249-250). The evidence showed (1) that racking boards for drilling rigs should be side raked (fingers to the side of the racking board, See Plaintiff's Exhibit 23.1), and (2) that the accident could not have happened in the manner it did with a side-raked racking board (Tr. 728, line 19 to Tr. 729, line 22). The evidence also showed there were other alternative feasible designs for end-raked racking boards to prevent Hunter's death. There was an alternative design

available that would have allowed the same pipe to be racked and secured in the racking board without developing any lean toward the mast.

Howard A. Elwell, an expert in the field of safety engineering, who received a BS degree in mechanical engineering from Purdue University in 1963, expressed an expert opinion that any mast or derrick manufacturer should have known that the "reasonably anticipated use" of that product included the hazard for shifting or swarming pipe to fall out of the racking board and across or into the mast or derrick (Tr. 394-419). The documentary evidence showed that pipe shifting or swarming and falling across the derrick or mast was a reasonably anticipated hazard of use that was or should have been well known to any rig manufacturer prior to the manufacture of this mast and racking board in June 1981, and that other rig manufacturers had reasonably anticipated uses that would cause pipe to swarm, and designed their racking boards to prevent pipe swarming.

After the close of plaintiffs' evidence, KREMCO moved for a directed verdict (judgment as a matter of law) without specifying any grounds therefor.[1] Thereafter, during the review of and objections to the jury instructions and jury

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[1] The entire colloquy on the initial motion was as follows:

> THE COURT: YOU HAD MADE REFERENCE, MR. RANEY, TO SOME MOTION, I BELIEVE, THAT YOU WANTED TO MAKE AT THE NEXT RECESS. THIS IS THE NEXT RECESS.
>
> MR. RANEY: YES, SIR, WE WOULD MOVE TO DISMISS AT THIS TIME ON A DIRECTED VERDICT, YOUR HONOR.
>
> THE COURT: ALL RIGHT, I'LL CONSIDER THAT MOTION AS HAVING BEEN MADE AND DENIED, AND WE WILL BE IN RECESS FOR THE NEXT 20 MINUTES TO ALLOW YOU TO PREPARE FOR YOUR CASE IN CHIEF.

verdict form, KREMCO did not object to the fact that the issue of reasonably anticipated use was being submitted to the jury. Tr. 759-785. At the close of the defendants' case, KREMCO did not renew its blanket motion for judgment as a matter of law. Tr. 846-847. At the close of all the evidence, prior to submission of the case to the jury, KREMCO re-urged its motion to dismiss, again without specifying any reasons,[2] and the court again denied the motion for judgment as a matter of law.

The jury returned a verdict in favor of the Hunters, specifically finding on the special verdict form that: (1) the racking board was unreasonably dangerous when it left KREMCO's control; (2) Hunter's death was caused by an unreasonably dangerous characteristic of the racking board during a reasonably anticipated use; (3) Hunter's death was

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[2] After the close of the evidence, the following colloquy occurred:

> MR. RANEY: YOUR HONOR, JUST A COUPLE OF MATTERS BRIEFLY, IF I MAY.
>
> THE COURT: YES.
>
> MR. RANEY: FIRST OF ALL, SINCE YOU ALLOWED ARGUMENT ON MR. PERRAULT'S TESTIMONY, I PRESUME THAT THAT WAS REGISTERED AS AN OBJECTION BY ME IN THE RECORD?
>
> THE COURT: I CONSIDERED IT AS SUCH.
>
> MR. RANEY: THANK YOU. AND WE WOULD RE-URGE OUR MOTION AT THIS TIME FOR DISMISSAL.
>
> THE COURT: THE MOTION FOR JUDGMENT AS A MATTER OF LAW WILL BE NOTED AND DENIED AT THIS TIME. (Transcript at p. 891.)

caused also by his negligence; (4) the latches were unreasonably dangerous; (5) Hunter's death was caused also by an unreasonably dangerous characteristic of the latches; (6) R. L. Long was a cause of an unreasonably dangerous characteristic of the latches; (7) Mosley Well Service did not cause any unreasonably dangerous characteristic of the latches; and (8) Hunter's death was caused also by the negligence of Mosley Well Service employees. The jury assessed fault as follows: KREMCO 30%, Hunter 5%, Long 30%, and Mosley 35%.[3] Accordingly, under the court's calculations, petitioners were to recover 50% of the stipulated damages, approximately $652,000.00.

After the verdict, KREMCO filed a Motion for Judgment as a Matter of Law in which it raised for the first time the contention that the Jury's finding that the accident at issue occurred during a reasonably anticipated use of the racking board was erroneous as a matter of fact and law. The Trial Court, in a Memorandum Ruling dated July 22, 1994 (App. A-26), denied the motion.

The Hunters appealed the District Court's apportionment of damages against KREMCO. KREMCO cross-appealed, contending that the racking board was not being handled at the time of the accident in a manner reasonably anticipated by the manufacturer, and that it was not unreasonably dangerous.

In a two to one decision that the dissenting judge described as "aberrant," the Court of Appeals reversed the jury verdict and held that, as a matter of law, a reasonable jury could not have reached the conclusion that the use of the racking board on the evening of the fatal accident was a use that was, or should have been, reasonably anticipated by

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[3] R. L. Long Co. was defunct long before trial in this case, and accordingly petitioners did not file suit against that company or its former owner, R. L. Long, who is deceased. Mosley Well Service was decedent's employer, and was thus statutorily immune from tort damages.

KREMCO.[4] Petitioners filed a Petition for Rehearing and Suggestion for Rehearing *en banc*, which the Court, again in a two to one decision, denied. From the Fifth Circuit's decision, petitioners seek a writ of review.

REASONS FOR GRANTING THE WRIT

This case presents issues of urgent import, not only for the bereaved wife and children of Claude Hunter, who have been denied all recovery for his untimely death, but for every citizen of Louisiana who is compelled to litigate a products liability suit in federal court in Louisiana. Further, the decision raises serious constitutional issues regarding the right to trial by jury, conflicts with the prior jurisprudence of this Court and every other Circuit Court, violates the Federal Rules of Civil Procedure and the Rules of Decision Act, misinterprets and misapplies Louisiana law, and constitutes a gross departure from proper judicial proceedings.

In this products liability decision, which the dissenting Judge described as "aberrant," the Fifth Circuit reversed a jury's considered verdict and the trial court's denial of the defendants' motions for judgment as a matter of law, and rendered judgment for defendants, all on the factual issue of the "reasonably anticipated use" of the product, an issue that was never raised in defendants' pre-verdict motions for judgment as a matter of law. This decision is contrary to the Seventh Amendment to the United States Constitution; Fed.

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[4] In the course of its Opinion, the Court of Appeals stated that: "As it had at the close of the Hunters' case and of all the evidence, KREMCO moved for judgment as a matter of law on, inter alia, whether the accident occurred, as required by LPLA, during a "reasonably anticipated use" of the racking board." Opinion at 806. As demonstrated above, this assumption was clearly in error, because KREMCO never specified the basis for its blanket motions. Petitioners attempted to have the Court correct this error in a pleading requesting the court to void its judgment for lack of power and jurisdiction to rule on the sufficiency of the evidence. The Court refused to permit petitioners to file this pleading.

R. Civ. P. 50(a)(2); this Court's decisions in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (67 S.Ct. 752, 91 L.Ed. 849); *Globe Liquor Co. v. San Roman,* 332 U.S. 571 (68 S.Ct. 246, 92 L.Ed. 177); and innumerable decisions of the Circuit Courts, which indicate that a Court of Appeals has no power to render a Judgment as a Matter of Law in a case where proper and specific motions are not presented. The only power that the Court had in this case was to determine whether there was "any evidence" to support the jury's verdict, and if not, to order a new trial.

Furthermore, even assuming that the defendants' objections to the sufficiency of the evidence had been preserved for review, as the dissenting Judge pointed out, there was abundant evidence from which the jury could reasonably conclude that the decedent and his employer's use of the pipe racking board to rack pipe (albeit in a less than perfect manner) was reasonably anticipated by the manufacturer. Several witnesses testified that racking pipe in the manner in which occurred on the evening of Claude Hunter's death, with a slight lean, was common and known to (and thus reasonably anticipated by) manufacturers, many of whom have designed safeguards on their products to prevent such incidents. As such, the Court of Appeals, in taking the case from the jury and substituting its own credibility determinations and findings of fact, completely ignored the proper standards of review of a jury verdict, in violation of: the Seventh Amendment to the Constitution; the decision of this Court in *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242 (1986); innumerable decisions of the Circuit Courts regarding the proper standard of appellate review of jury verdicts; and proper judicial procedure.

As if that were not sufficient, the Fifth Circuit has taken upon itself to decide issues of Louisiana Law raised by the recently enacted Louisiana Products Liability Act, in complete conflict with the terms of the Act; with the comments of the author of the Act, and with long-standing Louisiana law and

jurisprudence regarding comparative fault. Under the Fifth Circuit's decision, negligent use or any slight misuse of a product may now constitute an absolute bar to a plaintiff's recovery in a products liability case, despite the fact that Louisiana long ago legislatively abolished the doctrine of contributory negligence as a bar to recovery in tort cases, and the fact that the Louisiana Supreme Court has expressly held in controlling jurisprudence that contributory negligence is not a bar in products liability cases. In fact, oftentimes, based on policy reasons, Louisiana Courts will not even permit a plaintiff's comparative negligence to be used to diminish his recovery in products liability cases!

Petitioners respectfully submit, as the dissenting Judge observed, that the Fifth Circuit stepped in the jury box in this case. In the process, the Court has severely impacted Louisiana law on comparative fault, and caused a great disparity between cases that will be tried in federal as opposed to state court in Louisiana.

For these reasons, and other reasons that this Honorable Court may ascertain, petitioners respectfully urge this Court to issue a writ, review and ultimately reverse the judgment of the Fifth Circuit in this case.

A. THE COURT OF APPEALS WAS WITHOUT POWER TO REVERSE THE JURY VERDICT AND GRANT JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF REASONABLY ANTICIPATED USE, BECAUSE DEFENDANTS DID NOT PRESENT SPECIFIC MOTIONS FOR JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF REASONABLY ANTICIPATED USE PRIOR TO SUBMISSION OF THE CASE TO THE JURY. THE DECISION CONTRAVENES THE SEVENTH AMENDMENT, VIOLATES FED. R. CIV. P. 50(A)(2), CONFLICTS WITH DECISIONS OF THIS COURT AND THE OTHER CIRCUIT

COURTS, AND SO FAR DEPARTS FROM THE ACCEPTED COURSE OF PROPER JUDICIAL PROCEEDINGS AS TO MERIT REVIEW.

Although the Court of Appeals erroneously assumed otherwise (see n. 4, *supra*), defendants failed to make specific motions for judgment as a matter of law on the issue of reasonably anticipated use. In fact, the two motions defendants made, one at the close of plaintiff's case, and the other at the close of the evidence, failed to specify any factual grounds, any law, or any reasons at all in support of the motions. Tr. 532, 891, set forth in n. 1 and n. 2, *supra*. It was not until after the verdict was rendered that defendants filed a new motion for judgment as a matter of law contending that the evidence on the issue of reasonably anticipated use of the racking board was insufficient.

As such, the Court of Appeals erred in reviewing the sufficiency of the evidence on the issue of reasonably anticipated use, reversing the jury's verdict that the use was reasonable, and rendering judgment as a matter of law in favor of defendants on the issue of reasonable use. As discussed *infra*, the Fifth Circuit's decision granting judgment as a matter of law on an issue that was not specifically raised in pre-verdict motions for judgment as a matter of law contravenes the Seventh Amendment to the United States Constitution; violates Fed. R. Civ. P. 50(a)(2); is inconsistent with this Court's decisions in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947) and *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 68 S.Ct. 246, 92 L.Ed. 177 (1948); conflicts with decisions of the Circuit Courts that require that pre-verdict motions for judgment as a matter of law specify the grounds, facts and law in support of the motions; and grossly departs from the accepted course of judicial proceedings, meriting the issuance of a writ.

1. Defendants' blanket pre-verdict Motions for Judgment as a Matter of Law were improper and insufficient.

Appellate review of a jury's factual findings is properly raised by a challenge to the Trial Court's disposition of a Rule 50 Motion for a Judgment as a Matter of Law (formerly a Motion for Directed Verdict or Motion for JNOV), filed at the close of the plaintiff's case and/or the close of the evidence, and renewed after the verdict is rendered. S. Childress, M. Davis, *Federal Standards of Review*, § 3.01, at 3-3 (2d ed. 1992).

Pursuant to the express terms of Rule 50(a)(2)[5], the commentators and the case-law, it is well settled that Motions for Judgment as a Matter of Law must be made prior to submission of the case to the jury and must specify the grounds therefor. As the official comments to Rule 50 state: "The second sentence of paragraph (a)(2) does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof..." Rule 50(a)(2), 1991 Advisory Committee Notes.

The commentators and the Circuit Courts uniformly agree: in making a motion for judgment as a matter of law, the movant must state the specific grounds for the motion, and, for purposes of preserving the movant's rights on appeal, the grounds are limited to those specifically stated. S. Childress, M. Davis, *Federal Standards of Review*, *supra*, at

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[5] Fed. R. Civ. Proc. 50(a)(2) provides: "Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion **shall** specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." (emphasis added).

sec. 3.14, p. 3-142; *Hinojosa v City of Terrell,* 834 F.2d 1223, 1228 (5th Cir. 1988).

In the instant case, defendants did not specify any grounds for their motions before the district court, and the motions therefore were improper and insufficient.

2. Accordingly, the Court of Appeals erred in conducting a sufficiency review on the issue of reasonably anticipated use.

This Court has, on several occasions, held that the Courts of Appeal are without power to direct the entry of a judgment notwithstanding the verdict when a party fails to proceed in accord with the procedures set forth in Rule 50. See, e.g., *Globe Liquor Co. v. San Roman,* 68 S.Ct. 246, 332 U.S. 571, 92 L.Ed. 177; *Cone v. West Virginia Pulp & Paper Co.,* 67 S.Ct. 752, 330 U.S. 212, 91 L.Ed. 849 (1947.) Indeed, absent a motion for directed verdict, judicial reexamination of the evidence abridges a plaintiff's Seventh Amendment right to trial by jury. *Fineman v. Armstrong World Industries, Inc.,* 980 F.2d 171 (3d Cir. 1992) *rehearing denied, certiorari denied* 113 S.Ct. 1285, 122 L.Ed.2d 677 (1993). The same rationale should apply in cases, such as the instant case, where the motions are insufficient and improper.

In innumerable decisions of the Circuit Courts, the Courts hold that where the grounds for a motion for directed verdict or judgment as a matter of law are not specified, the unspecified issues are not preserved for review, and the Court of Appeals has no power to review those issues. See, e.g., *Lewis v. Kendrick,* 944 F.2d 949 (1st Cir. 1991); *Railway Exp. Agency, Inc. v. Epperson,* 240 F.2d 189 (8th Cir. 1957); *Jones Truck Lines, Inc. v. Argo,* 237 F.2d 649 (8th Cir. 1956); *Stilwell v. Hertz Drivurself Stations,* 174 F.2d 714 (3d Cir. 1949); *Friedman v. Decatur Corp.,* 135 F.2d 812, 77 U.S.App.D.C. 326 (D.C. Cir. 1943); *Maryland Cas. Co. v.*

Talley, 115 F.2d 807 (5th Cir. 1940); *Virginia-Carolina Tie & Wood Co. v. Dunbar*, 106 F.2d 383 (4th Cir. 1949).

In instances where the complaining party on appeal fails to challenge the sufficiency of the evidence before the lower court, the jury's findings alone are not subject to appellate review, because "Federal Courts simply do not directly review jury verdicts." *Coughlin v Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir. 1978). Under such circumstances, the Court's inquiry "is limited to whether there was any evidence to support the jury's verdict, irrespective of its sufficiency..." *Id., citing American Lease Plans, Inc. v Houghton Construction Co.*, 492 F.2d 34, 35 (5th Cir. 1974) (per curiam); *Little v Bankers Life & Casualty Co.*, 426 F.2d 509, 511 (5th Cir. 1970.) *Accord, Merchant's National Bank Southeastern Fire Ins. Co., Inc.*, 854 F.2d 100 (5th Cir. 1988); *Stewart v Thigpen*, 730 F.2d 1002, 1007 (5th Cir. 1984).[6]

Considering that the defendants did not make the proper sufficiency motions on the issue of reasonably anticipated use under Fed. R. Civ. P. 50(a)(2) in the instant case, the Court of Appeals erred in reviewing the jury's verdict that the use was reasonably anticipated, reversing the jury's factual finding that the use was reasonably anticipated, and granting a judgment as a matter of law on the issue. The Court's review should have been limited to the determination whether there was "any evidence" to support the jury's factual determination that the use of the racking board was reasonably anticipated. As discussed in detail *infra*, there was abundant evidence that the racking board was used in accord

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[6] Even if a reviewing Court does find, under this extremely strict standard, that there is no evidence supporting a finding, it is limited in the actions it may thereafter take. In such a situation, the Court of Appeal cannot reverse and render; rather, it must reverse and remand for a new trial. *See, Zervas v Faulkner*, 861 F.2d 823, 829, n.9 (5th Cir. 1988); *Hinojosa v City of Terrell*, 834 F.2d 1223, 1228 (5th Cir. 1988); *Smith v Trans-World Drilling Co.*, 772 F.2d 157, 160 (5th Cir. 1985.)

with its reasonably anticipated use. Thus, under proper application of the law and settled judicial procedure, the verdict should have been affirmed.

B. ADDITIONALLY, THERE WAS ABUNDANT EVIDENCE IN PETITIONERS' FAVOR ON THE ISSUE OF REASONABLY ANTICIPATED USE, AND THE COURT OF APPEALS ERRED IN SUBSTITUTING ITS FACTUAL FINDINGS FOR THOSE OF THE JURY. THE COURT'S DECISION VIOLATES THE SEVENTH AMENDMENT; CONTRAVENES THIS COURT'S DECISION IN *ANDERSON V LIBERTY LOBBY, INC.*, 477 U.S. 242 (1986); CONFLICTS WITH DECISIONS OF THE CIRCUIT COURTS REGARDING WELL SETTLED STANDARDS OF APPELLATE REVIEW; AND CONSTITUTES AN EXTREME DEPARTURE FROM PROPER JUDICIAL PROCEDURE, MERITING A WRIT.

Even assuming, but not conceding, that defendants properly preserved the issue of reasonably anticipated use for appeal, there was, as the dissenting judge recounted, abundant evidence to support the jury's verdict that Hunter's death was caused by an unreasonably dangerous characteristic of the racking board during a reasonably anticipated use. As such, under the proper standards of appellate review of jury verdicts, the Court of Appeal, in deciding that the use of the racking board was not reasonably anticipated, erred in substituting its own factual findings for those of the jury, and usurping the jury's function. As discussed *infra*, the decision conflicts with the Seventh Amendment to the United States Constitution, with this Court's decision in *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) and progeny, and with innumerable decisions of the other Circuits, meriting a writ.

As Judge Benavides aptly noted in his strong dissent in this case, the standard of review of jury verdicts is very strict.

The court must view all of the evidence in favor of the prevailing party. The jury's decision must be accepted if the record contains any competent evidence tending to support the verdict. Dissent, at 811, *citing Gann v. Fruehauf Corp.*, 52 F.3d 1320, 1326 (5th Cir. 1995); *Knowlton v. Greenwood Indep. Sch. Dist.*, 957 F.2d 1172, 1178 (5th Cir.1992). "If there is an evidentiary basis upon which the verdict can be supported, the jury's determinations will be left undisturbed, even where there is substantial contradictory evidence that could have supported an opposite verdict." Dissent, at 811 *quoting Gibraltar Sav. v. LD Brinkman Corp.*, 860 F.2d 1275, 1297 (5th Cir.1988), *cert. denied*, 490 U.S. 1091, 109 S.Ct. 2432, 104 L.Ed.2d 988 (1989), *accord Knowlton*, 957 F.2d at 1178.

The appellate court cannot substitute its own judgment by weighing conflicting evidence or inferences, or by making credibility determinations. S. Childress, M. Davis, *supra*, at § 3.05, p. 3-49. In all cases "...it is the function of the jury as the traditional finder of fact, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Boeing Co. v Shipman*, 411 F.2d 365, 375 (5th Cir. 1969) (en banc). *Accord, Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986.)

Indeed, as Judge Benavides observed, the majority in the instant case lost sight of this standard. The jury found that Hunter's death was caused by an unreasonably dangerous characteristic of the racking board during a reasonably anticipated use. Given the strict standard of appellate review, the Court was required to uphold that verdict if there existed evidence in the record to support that conclusion, even if there was substantial evidence to the contrary. In this case, there was abundant evidence that racking with negative lean itself is common and the overall use of the racking board was routine, and the jury's decision to credit that evidence and testimony should not have been overturned.

In this case, the majority came to the conclusion that the pipe was racked with such an "unreasonable" and "dangerous lean" toward the mast that the "danger" of falling pipes was "certainly obvious to the experienced workers at Mosley Well Service". To make this finding of fact, the majority relied upon the deposition testimony of Eric Beavers (Beavers was killed in a drilling rig accident prior to trial) that was taken on August 24, 1992, almost two (2) years after Hunter was killed racking the pipe. In his deposition, Beavers characterized the lean of the pipe as "ridiculous", but Eric Beavers signed a written statement the day after Hunter was killed stating "Maybe the angle of racking wasn't enough." and "Pipe could have started sliding from bottom and fell against derrick." (Tr. 888).

It was the province of the jury to weigh and evaluate Beavers' inconsistent statements to determine what was the truth. Likewise, it was the province of the jury to determine whether the lean of the pipe was unreasonably dangerous, and whether this function (use of the racking board to store and secure pipe, some of which had started leaning toward the mast) should have been reasonably anticipated by the manufacturer, and whether, and to what degree, the workers should have known they were in danger because some of the pipe was leaning toward the mast.

Kenneth Kaigler, an expert in the field of rig operations and safety, testified that Hunter was doing nothing wrong because he could not appreciate any danger without knowing this particular handrail was not designed to secure tubing (Tr. 358-361). He further testified that he has no problem with the pipe leaning toward the mast if it is properly retained (Tr. 359). The majority seized on Kaigler's statement that "It's not a common deal, but I have seen it" to support their finding of fact that this was not an expected "common" manner of use of the racking board. Despite the fact that it was the jury's province to credit or discredit testimony, the majority gave Kaigler's one statement greater weight than the statements of

three fact witnesses (Ray, Berry and Willoughby) who presented testimony from which the jury could determine that this was a "common" use of the racking board. In addition, the majority disregarded Kaigler's other testimony:

Q. Do you have an opinion about what Claude Hunter was doing that night, whether he was doing anything wrong?

A. I did not see any information or heard any information to indicate to me that Hunter was doing anything wrong. (Tr. 359, lines 2-6)

Q. Now, is there any way that Claude that night could have known what the forces were, the amount of forces that were being put on the back handrail?

A. No, sir.

Q. Did Claude, to your knowledge, have any way of knowing that KREMCO's board was designed, KREMCO's racking board was designed so the back handrail was not supposed to have pipe tied to it?

A. No, Sir. (Tr. 359, lines 17-25).

Moreover, at trial, rig operator Danny Ray testified that pipe is always tied to the back handrail. Ray also examined a diagram showing negative leaning pipe and testified as follows:

Q: In looking at this diagram, Mr. Ray, in looking at the way this pipe is racked, is this something that is common to you or at least seen by you out there in your work as an oil well service operator?

A: Yes, sir. Just about any time you trip pipe it always--it's tight at the bottom, but as you (sic) collars butt up against one another you're coming out of it, it mushrooms at the top. Kind of flares out. Gets bigger.

On cross examination, in direct response to whether it is common practice to lean pipe toward the mast, Ray testified: "You have to kind of do it the way you--to get the job done, you know? Not all wells are perfect and you just kind of gotta do the job the best you can. If you're tripping 12 or 14 thousand foot of pipe and you can space out the bottom some and it will throw some lean back in it once the pipe starts getting too much on you." Further, on redirect Ray was asked: "You have racked pipe with it leaning towards the mast before, haven't you?" Ray responded, "Yes, sir, I have."

In addition to Ray's testimony, rig operator Charles Berry testified that when they started tripping the pipe the workers used three to four inches of positive lean. He confirmed that pipe is always tied to the handrails. He examined the same exhibit showing negative leaning pipe that Ray described as commonplace and testified that the pipe looked the same way on the day of the accident.

On cross-examination, Berry was asked: "It's true, isn't it, Mr. Berry, that that handrail isn't meant to take the weight of all that pipe, is it; isn't that true?" Berry replied: "I'm going to put it like this if I may, I have tied pipe to handrails every time I have ever worked derricks on a drilling rig or a workover whether it's from the side handrail or the back handrail." In addition to Ray's testimony that pipe was always tied to the back handrail and Berry's testimony that he always tied to a handrail, derrickman Kenneth Willoughby was asked, "How have you secured pipe in the racking board in your 18 years of experience when there wasn't a chain up there to secure it in the racking board?" Willoughby responded: "Tie it off with sash cord or some kind of rope to your back handrail." The majority even conceded that "[a]ccording to the testimony, however, pipes are often tied to the back handrail." Op. at 805 n. 1.

Thus, despite the Court of Appeals' fact-finding that the use of the racking board was not common, there remains the testimony of Ray, Berry and Willoughby that a jury could find

credible and conclude that the racking board was being used in a manner that was common.

As the dissenting judge stated, viewing the record in the light most favorable to the verdict, there was credible evidence that the jury could credit that negative lean itself is common. Moreover, properly viewed in context, the overall use of the racking board was routine. The jury found that Hunter's death occurred during a reasonably anticipated use of the racking board. Judge Benavides aptly noted: "I would stay out of the jury box and affirm."[7]

The Fifth Circuit, in taking the issue away from the jury, usurped the function of the jury and petitioners' right to the jury's decision. This aberrant decision merits a writ.

C. THE FIFTH CIRCUIT'S DECISION CONTRAVENES AND MISAPPLIES LOUISIANA JURISPRUDENTIAL AND STATUTORY LAW, IN CONFLICT WITH THIS COURT'S DECISION IN *ERIE V. TOMPKINS* AND THE RULES OF DECISION ACT, 28. U.S.C. § 1652.

Under this Court's decision in *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and progeny, and the Rules of Decision Act, 28 U.S.C. § 1652, federal courts sitting in diversity must apply

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[7] Judge Benavides further observed that there was ample evidence to support the jury's verdict that the racking board was unreasonably dangerous:

> ...there was expert testimony of alternative designs and safety mechanisms, existing at the time of manufacture of the racking board at issue, which would have prevented Hunter's death. This evidence not only supports the jury's conclusion on an unreasonably dangerous product, but provides additional evidence from which a reasonable jury could conclude that the manufacturer should have anticipated negative lean; it appears that other manufacturers did.

the laws of the state in which they sit, including its statutes, in deciding controversies. This rule was intended to secure uniformity of decisions within each state so that cases dependent upon state law would not be decided differently according to whether they are before federal or state courts. *King v. Order of United Commercial Travelers of America,* 68 S.Ct. 488, 333 U.S. 153, 92 L.Ed. 608, *rehearing denied* 68 S.Ct. 900, 333 U.S. 878, 92 L.Ed. 1153 (1948). The two aims of the *Erie* rule are the discouragement of forum-shopping and the avoidance of inequitable administration of the laws. *Hanna v. Plumer*, 85 S.Ct. 1136, 380 U.S. 460, 14 L.Ed.2d 8 (1965.)

As discussed in detail, *infra,* the Fifth Circuit has interpreted the Louisiana Products Liability Act §9:2800(52)(A) requirement of "reasonably anticipated use" contrary to the Act, the intention of its drafters, and decisions of the Louisiana courts. Moreover, in determining that the issue of "reasonably anticipated use" is the threshold issue in products liability cases (thereby refusing to recognize that other grounds, including safer feasible alternative designs, also warranted the imposition of liability in this case) the Court ruled contrary to Louisiana law and decisions of Louisiana Courts. Finally, and most egregiously, the Court has ignored both controlling decisions of the Louisiana Supreme Court and Louisiana's Comparative Fault law, codified in La. Civil Code article 2323, which expressly state that contributory negligence can nevermore bar a plaintiff's recovery in tort cases—The most a court may reduce a plaintiff's recovery in Louisiana is by the percentage of his own comparative negligence.

Petitioners respectfully submit that the Fifth Circuit's decision decides vitally important questions of law contrary to the settled jurisprudence and express laws of Louisiana. Further, the decision will cause inequitable and diverse administration of the laws and forum shopping (e.g., removal efforts) by defendants. The decision contravenes the well

settled rule of *Erie R. Co. v Tompkins* and progeny and the Rules of Decision Act, meriting the issuance of a writ.

1. **The Fifth Circuit's interpretation of La. Rev. Stat. 9:2800(52)(A) conflicts with the terms of the Louisiana Products Liability Act, with commentary on the Act by its co-drafter, and with decisions of the Louisiana courts.**

The Louisiana Products Liability Act, in § 9:2800.54(A), provides that:

> The manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from a reasonably anticipated use of the product by the claimant or another person or entity.

"Reasonably anticipated use" is defined as "a use or handling of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances." La. Rev. Stat. Ann. § 9:2800.53(7).

In the instant case, the Fifth Circuit interpreted the term "reasonably anticipated use" to mean "common use."[8] The court concluded that the manner in which the pipe was being racked in this case, with a negative lean, was not "common," and therefore could not have been reasonably anticipated by the manufacturer, KREMCO. Further, the Court implied that negligent use or misuse could never be a reasonably anticipated use.

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[8] Although the Court appeared to retreat somewhat from this position in its denial of rehearing, petitioners suggest that the damage is still done, and that the Court's shift provides no help for the family members of the decedent, Claude Hunter.

In holding that a "reasonably anticipated use" of a product must be a "common" use of that product, and that misuse could never be actionable, the Court of Appeals failed to follow the LPLA and controlling Louisiana product liability jurisprudence.

John Kennedy, who, along with Professor H. Alston Johnson, III, drafted the LPLA, stated in his article, *A Primer on the Louisiana Products Liability Act*, 49 La.L.Rev. 565 (1989), that:

> The fourth element of an LPLA cause of action set forth in section 2800.54(A) also departs from prior law but only in one respect. This, as mentioned, is by substituting 'reasonably anticipated use' for 'normal use.' The purpose of both terms is to express the types of product **uses and misuses** by a consumer that a manufacturer must take into account when he designs a product, drafts instructions for its use and provides warnings about the product's dangers in order that the product not be unreasonably dangerous." *Id at* 584. (emphasis added.)

In support of this statement, Kennedy, the co-drafter of the LPLA, cited *Bloxom v Bloxom*, 512 So.2d 839 (La. 1987), a Louisiana Supreme Court case wherein the Court discussed the term "normal use." The Supreme Court therein stated:

> "Normal use" is a term of art that includes all intended uses, as well as all foreseeable **uses and misuses** of the product. *Rey v. Cuccia*, 298 So.2d 840 (La.1974); *Branch v. Chevron Oil Co., Inc.*, 681 F.2d 426 (5th Cir.1982); *LeBouef v. Goodyear Tire & Rubber Co.*, 623 F.2d 985 (5th Cir.1980).

Bloxom, 512 So.2d at 843 (emphasis added.) In accord are post LPLA decisions such as *Hoyt v. Wood/Chuck Chipper Corp.*, 651 So.2d 1344 (1st. Cir. 1995) *cert. denied* 654 So.2d

695 (La. 1995) and *Johnson v. Chicago Pneumatic Tool Company*, 607 So.2d 615, 617 (La. App. 1st Cir.), *writ denied*, 608 So.2d 1009 (La.1992).

It may be true, as a few intermediate state courts have opined,[9] that the term "reasonably anticipated use" is narrower than prior jurisprudential definitions allowing recovery for all conceivable misuses of a product. However, in determining that any negligent use or misuse of a product cannot be a "reasonably anticipated use," the Court ignored not only the words of the co-drafter of the LPLA, but also the Louisiana cases that state that misuse is actionable, and other cases that help define the term "reasonably anticipated use."

Daigle v. Audi of America, Inc., 598 So.2d 1304 (La. App. 3d Cir. 1992), relied upon by the Court, provides a discussion of reasonably anticipated use. However, the examples cited in the comments to that case (the same examples cited by Kennedy, *supra*) show that reasonably anticipated uses envisioned by the drafters of the legislation spoke to the "function" of the product: a manufacturer should not have to anticipate that a coke bottle will have to "function" as a hammer; a manufacturer should not have to anticipate an automobile will have to "function" as a boat; a manufacturer should not have to anticipate body perfume will have to "function" as a scent for a candle.[10]

In the instant case, plaintiff was using the racking board in accord with its intended function, to rack pipe, and not some other bizarre and unintended function. Thus, the legal

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[9] Interestingly, recent intermediate state court decisions have cited federal Fifth Circuit cases as authority for their conclusions!

[10] Even so, *Daigle* does not discuss whether under the LPLA these facts would create an issue for a jury, because the case was tried to a judge, who dismissed the case. On affirming the lower court's ruling, the appellate court was very careful to point out the substantial differences in the standards between reviewing a directed verdict and a judgment notwithstanding the verdict in a jury trial, and a motion for involuntary dismissal in a judge trial.

test created by the Court will overturn a line of jurisprudence where the employee's negligent manner of use of the product was not the "common" manner of use of the product, but the product was being used to perform a function for which it was designed when the unreasonably dangerous design caused injury to the employee, emanating from *Bell v. Jet Wheel Blast*, 462 So.2d 166 (La.1985) and *Robertson v. Superior PMI, Inc.*, 791 F.2d 402, 407-08 (5th Cir.1986).

None of the cases cited by the majority support or suggest that "reasonably anticipated use" should be interpreted to mean "common" use as a standard to recover damages caused by an unreasonably dangerously designed product under the LPLA. And, neither the law, the commentary or the cases suggest that negligent use or misuse can never be a "reasonably anticipated use."

As Judge Benavides recognized in his dissent, because this case did not involve use of a product for a different function than intended, such as using a soda bottle as a hammer or driving a car across water, but rather for racking pipe, as the manufacturer intended, the issue of the alleged negligent use of the racking board spoke to the workers' comparative fault, not to the issue of reasonably anticipated use.[11] As such, the Court should not have decided that the workers' alleged fault barred plaintiffs' recovery.

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[11] Judge Benavides noted:

> The evidence at trial reflects that the pipe was initially being racked with positive lean. It was secured to the back handrail as was common. As the pipe was being racked, it grew larger as expected. As a result, there was negative lean. At this point, the workers negligently failed to correct the lean. This failure, however, does not lead to the conclusion that the overall use of the board was not a reasonably anticipated one. Rather, the workers' failure to correct the lean speaks to their comparative fault. The jury clearly understood this and found both Hunter and his co-workers partially at fault. The workers' negligence should not, however, insulate KREMCO from its own fault. Viewing the

2. The Fifth Circuit's decision misapplies Louisiana Products Liability law in failing to recognize that other grounds (including safer feasible alternative designs and defective latches) warranted the imposition of liability despite a finding of unanticipated use of the racking board.

The Fifth Circuit, in essence, held that the threshold issue (first step) in a products liability case is to determine the reasonably anticipated "common" use of the product. If the product is not being used in a "common" manner by the user, then this manner of use is not a reasonably anticipated use of the product, and the claim should be dismissed even though the product is unreasonably dangerous. Using this analysis, a Court can or must disregard or ignore any unreasonably dangerous characteristic of a product that proximately causes death or serious injury to a user while the product is being used for a function for which it was designed, unless the Court first determines the "reasonably anticipated use" of the product by the user, as a matter of law, is the expected "common" manner of use of the product.

Thus, the Fifth Circuit has created a legal test that will cause the dismissal of most pending product liability cases before the cases ever reach the jury, even if the claimants can prove there existed at the time of manufacture an alternative feasible design that was capable of preventing the death or injury. None of the cases cited by the majority suggest that reasonably anticipated use should be interpreted to mean "common" use as a standard to recover damages caused by an unreasonably dangerous designed product under the Louisiana Products Liability Act.

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entire context of the use of the racking board prior to the accident, a reasonable jury could conclude that it was being used in a manner that was reasonably anticipated by the manufacturer.

Further, Louisiana cases have recognized that plaintiffs may prove either that the product was unreasonably dangerous in its reasonably anticipated use or that there existed a feasible alternative safer design. For example, in *Delphen v. Dept. of Transp. & Dev.*, 657 So.2d 328 (La. App. 4th Cir. 1995) *writ denied* 663 So.2d 716, 717 (La. 1995), the Court stated:

> Plaintiffs must prove that a product is defective if it is unreasonably dangerous in its reasonably anticipated use **or** that there existed, at the time of the manufacture, a feasible alternative design capable of preventing the injury. La. R.S. 9:2800.54(A) (emphasis added).

The Fifth Circuit majority opinion is inconsistent with the Fifth Circuit and Louisiana cases interpreting the LPLA. No case has adopted the legal test (threshold issue of reasonably anticipated use) espoused by the majority. If the opinion is allowed to stand, it will cause a great injustice to many present and future pending product liability claimants whose claims are dismissed because the user was not using the product in a reasonably anticipated "common" manner. This is true even if it can be proved that the unreasonably dangerous design of the product proximately caused death or injury, and there existed at the time of manufacture an alternative feasible design that was capable of preventing the death or injury.

3. The Fifth Circuit's decision reinstates the doctrine of contributory negligence as a bar to recovery in federal courts sitting in Louisiana, in direct contradiction to Louisiana Supreme Court decisions and Louisiana law of comparative fault.

The majority decision held that negligent use or misuse of a product is not a "common" or reasonably anticipated use of the product under the LPLA, and determined that the issue whether the use was "common" or reasonably anticipated by the manufacturer was the *threshold issue* in products liability

cases under the LPLA. As such, if a plaintiff is found to have been negligent in the use or misuse of a product, even one that is unreasonably dangerous, his recovery will be completely foreclosed.

As such, the Fifth Circuit has effectively resurrected the long deceased doctrine of contributory negligence in Louisiana. This unfortunate decision ignores well reasoned decisions of Louisiana's highest court holding that contributory negligence is not a bar to recovery in products liability cases, e.g., *Bell v. Jet Wheel Blast, Div. of Ervin Industries*, 462 So.2d 166 (La. 1985),[12] and progeny, and emasculates Louisiana's comparative fault law, as set forth in La. Civil Code Article 2323.

In *Bell, supra,* the Louisiana Supreme Court considered the following question of law certified by the Fifth Circuit:

> "Does the Louisiana Civil Code permit the defense known as contributory negligence to be advanced to defeat or mitigate a claim of strict liability based upon a defective product, the theory of liability commonly known as 'product liability?' "

Bell, supra, 467 So.2d at 168.

The Supreme Court, per Justice Dennis, answered the Fifth Circuit's question in the negative, holding that, after the 1979 adoption of Louisiana's comparative fault law, contributory negligence could not bar a plaintiff's recovery in products liability or any other tort cases in Louisiana. Under article 2323:

> [A] plaintiff's claim for damages no longer can be barred totally because of his negligence. At

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[12] The scholarly and well reasoned decision in *Bell v Jet Wheel Blast, supra,* which remains good law in Louisiana, was authored by former Justice Dennis of the Louisiana Supreme Court, who was recently appointed as Judge on the United States Court of Appeals for the Fifth Circuit.

> most his claim may be reduced in proportion to his fault. Thus, the net effect of article 2323, as amended, is to prevent the courts from applying any defense more injurious to a damage claim than comparative negligence. *Bell, supra,* 467 So.2d at 170 (emphasis added).

The *Bell* Court further stated that:

> Contributory negligence as a complete bar to recovery does not apply in products liability cases because it is incompatible with that doctrine. The contributory negligence defense would permit the manufacturer to breach his duty to manufacture a reasonably safe product and escape liability simply because the fault of the user of the defective product contributed to the accident. Thus, in many instances the manufacturer would have no incentive to make and market a safer product, and the user who is usually less able to distribute the loss would be forced to absorb even the portion of the damages attributable to the unreasonably dangerous condition of the manufacturer's product.

Bell, supra, 467 So.2d at 171 (emphasis added).

Furthermore, the *Bell* Court went on to note that comparative fault may apply in some but not all products liability cases according to the facts of the case and policy considerations, and declined to apply the doctrine to reduce the plaintiff's recovery:

> The principle [of comparative fault] does not apply, however, and the plaintiff's recovery cannot be diminished in a case such as the present one involving an industrial accident resulting in injury to an employee's hand due to defective machinery and the employee's ordinary contributory negligence. Under these

> circumstances the application of comparative fault would tend to defeat the basic goals of strict products liability without providing any additional incentive for careful product use.

Bell, supra, 467 So.2d at 173 (emphasis added).

The Court of Appeal in this case seemed to recognize some of the problems it was creating, when it stated in Footnote 2 (after criticizing the Louisiana Supreme Court's still valid decision in *Bell v Jet Wheel Blast, supra,* and apparently mis-stating the Kennedy article, *supra*) that "We recognize that there may well be inherent conflicts between liability under the LPLA and comparative fault." At the very least, this case presents vital issues on the interpretation of the LPLA and the application of comparative fault under the LPLA that should be determined by the Louisiana Supreme Court, and not the federal court of appeal.[13]

CONCLUSION

The Court of Appeals had no power to review and reverse the jury's verdict finding defendant KREMCO liable for Claude Hunter's death. The factual issue on which the Court reversed (the question whether the use of the racking board to rack pipe was a use that was reasonably anticipated by the manufacturer) was not raised in either of defendants' pre-verdict motions for judgment as a matter of law, as required by the Seventh Amendment, Fed. Rule Civ. Proc.

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[13] Plaintiffs requested, in their application for rehearing in the instant case, that the Fifth Circuit certify the question to the Louisiana Supreme Court, to let it decide the proper interpretation of the LPLA. The Fifth Circuit denied plaintiffs' request, and called the plaintiffs' request "belated." However, plaintiffs had no way to know that the Court would render such an astounding decision. And, interestingly, it appears that the Fifth Circuit's question in *Bell v. Jet Wheel Blast, Div. of Ervin Industries*, 462 So.2d 166 (La. 1985), which the Court's opinion avoids, was certified after the rendition of the original opinion. Rather than determining a critically important issue in Louisiana law on its own, and doing so contrary to the weight of authority, certification would have been the preferable course.

Rule 50(a)(2), this Court, and innumerable decisions of the other Circuits. Moreover, the issue presented a consummate and disputed question of fact on which there was abundant conflicting evidence. As such, the Court of Appeals usurped the function of the jury as fact-finder, in contravention of the Seventh Amendment, decisions of this Court and the other Circuits, and well settled principles of appellate review.

In addition, the Court of Appeals' decision, which failed to apply Louisiana law and jurisprudence, was improper and extremely prejudicial to those Louisiana products liability plaintiffs who will be forced to litigate in federal court. Moreover, the decision abrogates the doctrine of comparative fault and revives the doctrine of contributory negligence in products liability cases in Louisiana, contrary to settled Louisiana law and jurisprudence.

Petitioners respectfully submit that the Fifth Circuit's decision decides vitally important questions of law contrary to the settled jurisprudence and statutory laws of Louisiana. Further, the decision will cause inequitable and diverse administration of the laws and forum shopping (removal efforts) by defendants.

Accordingly, petitioners pray that a writ issue to review the decision of the Fifth Circuit in this case, and that the decision ultimately be reversed and remanded to the Fifth Circuit to decide the remaining issues on appeal.

Respectfully submitted,

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June 26, 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40822

FILED
NOV 29 1995

ILENE THURMAN HUNTER, obo Kathy Michelle Hunter, Claude Kenneth Hunter, Jr., Michael Christopher Hunter, and Melissa Ilene Hunter, and Donnovan Blaine Hunter,

Plaintiffs-Appellants-
Cross-Appellees,

versus

KNOLL RIG &
EQUIPMENT MANUFACTURING CO. LTD.,
A Subsidiary of Draco Group of Companies, Ltd., Et Al.,

Defendants-Appellees-
Cross-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana

RECEIVED
NOV 30 1995

Before SMITH, BARKSDALE, and BENAVIDES, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

In this Louisiana wrongful death products liability acton against a manufacturer, and arising out of a drilling rig accident, the principal issue at hand is whether, under the Louisiana Products Liability Act, the claimed unreasonably dangerous product was being used (handled) in a manner that the manufacturer, at the time of manufacture, should reasonably expect (reasonably anticipated use). The Hunters appeal the apportionment by the district court of damages against defendant Knoll Rig & Equipment Manufacturing Co., Ltd. (KREMCO); it cross-appeals, ~~cont~~ending that, *inter alia*, the product (drilling rig racking board) was not being handled in a reasonably anticipated manner at the time of the accident. Because we conclude that, based on this issue, KREMCO was entitled to judgment as a matter of law, we REVERSE and RENDER.

I.

In 1981, KREMCO, a Canadian drilling rig manufacturer, sold one of its rigs to R. L. Long Co.; one component was the racking board in issue. Long modified the rig and racking board to suit customer preferences. Long sold the modified rig, with the racking board, to Hunter's employer, Mosley Well Service, in 1984. Claude Kenneth Hunter was crushed fatally by falling pipes while he worked in August 1990 as a derrickman for Mosley on a drilling operation. Hunter was positioned on the racking board, which was attached, approximately 50 feet above the ground, to the mast of the drilling rig. The mast, often referred to as a "derrick", was raised to a near-vertical position at the drilling site.

The frame of the racking board in issue was rectangular, with one of the shorter sides being partly open; that

open end was closest to the derrick. Handrails enclosed the two long sides and the other short side. As hereinafter described, the top ends of drilling pipes are brought into the racking board through the open end. Inside the frame of the racking board is a platform, or "diving board", on which the derrickman stands; it is attached to the middle of the back frame of the racking board and runs parallel to its long sides. On an end-racked racking board, such as the one involved here, there are fingers on each side of, and parallel to, the diving board; they point toward the mast. On the racking board, there were five fingers to the left of the diving board and seven to the right, between which the drilling pipes were to be racked (inserted). As manufactured, the racking board did not have chains or other restraining devices to assist in preventing the pipes from falling across the mast if they began to lean too much in that direction.

The back and side handrails of the KREMCO racking board were modified by another entity subsequent to sale by KREMCO. When the original KREMCO back handrail was raised to the upright position, it jutted up against the side handrails. The back handrail was secured to the side handrails with heavy-duty pins inserted through the "ears" at an angle vertical to the ground. This design was modified by removing the ears and attaching a latch on each end to secure the back handrail. It was these latches that failed, allowing the handrail to come forward and the pipes tied to it to fall across the mast, crushing Hunter.

A derrickman racks stands of pipe, which are about 55-60 feet in length, as they are removed from the drilling hole. When workers on the ground remove the pipe, the derrickman maneuvers the top of the pipe between the rack-

ing board fingers, and leans it against the bottom back frame of the racking board. A crew member on the ground positions the bottom end of the pipe at ground level. The pipe is leaned away from the mast in a "positive lean", as is the industry standard, and should be supported by the back frame of the racking board. Leaning the pipe toward the mast, in a "negative lean", is dangerous, because the pipe could fall toward the mast.

On an end-racked racking board, one pipe after another is racked in a row from the back to the front of the racking board. As stated, the derrickman and workers on the ground must ensure that the pipes maintain a positive lean (away from the derrick and toward the back of the racking board). At the time of the accident, Hunter had racked approximately 143 stands of pipe, weighing approximately 110,000 pounds. Due to the large number of pipes that had to be racked, the rig workers were concerned that all of the pipes would not fit into the racking board; accordingly, in an effort to fit more pipes, they did not give them much positive lean. In fact, the pipes were given only about three to four inches of positive lean, whereas normally the lean should be approximately 12 to 20 inches from the vertical, which is somewhere in the neighborhood of one to two degrees.

In racking the pipes, Hunter tied the first pipe in each row to the back handrail of the racking board with a sashcord, and then tied each successive pipe in each row to the previous pipe. As noted, when Hunter began racking the pipes, they were leaned away from the mast (positive lean). However, because the pipes being racked were larger at the top than at the bottom, and because the initial positive lean was not great enough, the pipes leaned less and less toward the back

of the racking board as more and more pipes were racked, until the pipes were vertical and then leaning toward the mast.

In industry terms, "the pipes grew"; when this occurs, the workers on the gound should "kick out" the bottom ends of the pipes, so that they do not lean toward the mast (negative lean). Due to his vantage point, the derrickman (Hunter) is the first person who would detect a negative lean; it is his responsibility to notify the workers on the ground that the bottoms of the pipes need to be moved ("kicked out").

Because the pipes were tied to the back handrail,[1] when the pull from the negative lean of the pipes became too great, the latches failed, allowing the back handrail and pipes to fall toward the mast. In the accident, no part of the racking board manufactured by KREMCO failed. Only the latches failed; but, as noted, they had been installed by an entity other than KREMCO.

After this action was filed against KREMCO in 1991 in Louisiana state court under the Louisiana Products Liability Act, LA. REV. STAT. ANN. § 9:2800.51, *et seq.* (LPLA), KREMCO removed it to district court based on diversity jurisdiction. The parties consented to trial before a magistrate judge; and, following five days of testimony, the jury returned a verdict for the Hunters. It found: (1) the racking board was unreasonably dangerous when it left KREMCO's control;

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[1] According to testimony, tying pipes to the back handrail is a misuse of the racking board, because that rail is designed only to support the weight of the derrickman should he fall. In fact, the derrickman's safety wire is attached to that handrail. According to the testimony, however, pipes are often tied to the back handrail.

(2) Hunter's death was caused by an unreasonably dangerous characteristic of the racking board during a reasonably anticipated use; (3) Hunter's death was caused also by his negligence; (4) the latches were unreasonably dangerous; (5) Hunter's death was caused also by an unreasonably dangerous characteristic of the latches; (6) *Long caused the latches to be unreasonably dangerous*; (7) Mosley Well Service did not cause any unreasonbly dangerous characteristic of the latches; and (8) Hunter's death was caused also by the negligence of Mosley Well Service employees. The jury assessed fault as follows: KREMCO 30%, Hunter 5%, Long 30%, and Mosley 35%.[2]

Post-verdict, the district court found that Long is insolvent and that the Hunters had not received any compensation from Long. Of the stipulated damages of approximately $1.3 million, the court assessed approximately $652,000 against KREMCO. As it had at the close of the Hunters'

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[2] The dissent implies, incorrectly, that this opinion is based on the proposition that the comparative fault of other parties insulated KREMCO from its own fault. While some pre-LPLA cases have been criticized for going so far under the pre-LPLA standard of "normal use" as to treat product misuse as a defense the manufacturer had to prove, rather than something the plaintiff had to prove did not occur (*see e.g. Bell v. Jet Wheel Blast*, 462 So.2d 166, 172 (La. 1985)), the new LPLA standard of "reasonably anticipated use" is narrower in scope and does not include reasonably foreseeable misuse, as discussed *infra*. *Daigle v. Audi of America, Inc.*, 598 So.2d 1304, 1307 (La. App. 3d Cir. 1992); *Lockart v. Kobe Steel Ltd. Const. Mach. Div.*, 989 F.2d 864, 867 (5th Cir. 1993); John Kennedy, A Primer on the Louisiana Products Liability Act, 49 LA. L. Rev. 565, 584-86 (1989) (explaining that the LPLA standard of "reasonably anticipated use" is more narrow than the prior "normal use" standard and, *inter alia*, does not include product misuse) (Kennedy was a co-drafter of the LPLA.). We recognize that there may well be inherent conflicts between liability under the LPLA and comparative fault. The parties do not raise this issue, however, and we do not reach it.

case and of all the evidence, KREMCO moved for a judgment as a matter of law on, *inter alia*, whether the accident occurred, as required by LPLA, during a "reasonably anticipated use" of the racking board. The motion was denied.

II.

For this diversity action, the parties do not dispute that Louisiana law controls. *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938). The threshold issue is whether the manner in which the racking board was used when the accident occurred was "reasonably anticipated" by KREMCO at the time of manufacture.[3]

The LPLA provides that

> [t]he manufactureer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from a reasonably anticipated use of the product by the claimant or another person or entity.

LA. REV. STAT. ANN. § 9:2800.54 (A). Of critical importance here, "reasonably anticipated use" is defined as "a use or *handling* of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances." LA. REV. STAT. ANN. § 9:2800.53 (7)

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[3] Because we conclude that the manner in which the pipes were racked was not a "reasonably anticipated use", we need not reach the other issues presented, including whether the design of the racking board was unreasonably dangerous, whether KREMCO breached an express warranty, and whether liability and damages were apportioned properly.

(emphasis added). Accordingly, KREMCO can be liable only if the particular use (negative lean) of the racking board was "reasonably anticipated" by it; and, if it was not, we do not reach whether the racking board was unreasonably dangerous because, for example, it did not have a chain, or chains, across the open end. *Lockart v. Kobe Steel Ltd. Const. Mach. Div.*, 989 F.2d 864, 867 (5th Cir. 1993).

In *Lockart,* a products liability action was filed against the manufacturer of an excavator. Two workers had suspended a pontoon by looping a chain around the teeth of the excavator's bucket and the pontoon fell, killing one worker and injuring the other. Our court upheld summary judgment, because using the excavator to suspend the pontoon was not "reasonably anticipated" within the meaning of the LPLA. The court rejected the idea that a warning in the operator's manual not to hang objects from the bucket was evidence that the manufacturer had reasonably anticipated that the excavator would be used in that manner.

The fact that there were warnings on the product in *Lockart* does not distinguish it from the Hunters' case:

> Even if the warning did not reach the users, the LPLA speaks of "an ordinary person in [the] same or similar circumstances". These users had many years experience mining and working with heavy machinery, and both had taken company courses in equipment handling in 1986. The dangers of using the bucket to suspend a heavy pontoon should have been obvious to the ordinary consumer and certainly to experienced workers.

Lockart, 989 F.2d at 868 (footnote omitted).[4] This was consistent with the dictates of the LPLA:

> A manufacturer is not required to provide an adequate warning about his product when: ... The user or handler of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic.

LA. REV. STAT. ANN. § 9:2800.57 (B); *see e.g., Morgan v. Gaylord Container Corp.*, 30 F.3d 586, 591 (5th Cir. 1994).

In noting that the LPLA standard for reasonably anticipated use (defined in the previously quoted § 9:2800.53 (7)) is more stringent than the pre-LPLA standard, *Lockart*, 989 F.2d at 867, cited *Daigle v. Audi of America, Inc.*, 598 So.2d 1304, 1307 (La. App. 3d Cir. 1992), which recognized that "[t]his definition is narrower in scope than its pre-LPLA counterpart, 'normal use', which included all reasonably foreseeable uses and misuses of the product." As stated in *Lockart* "[t]his more restrictive scope of liability was to avoid prior confusion and because virtually any conceivable use is foreseeable". 989 F.2d at 867.

To illustrate the meaning of "reasonably anticipated use", *Daigle* gives the following examples of what uses a manufacturer should not reasonabaly expect of an ordinary person:

> "Reasonably anticipated use" ... convey[s] the

[4] In an attempt to distinguish *Lockart*, the dissent appears, erroneously, to rely in part on the warning.

> important message that the manufacturer is not responsible for accounting for every conceivable foreseeable use. It is foreseeable that a consumer might use a soft drink bottle for a hammer, might attempt to drive his automobile across water or might pour perfume on a candle to scent it. If he does, however, the manufacturer of the product should not be and under the LPLA is not liable because the uses in the illustrations are not the sort that a manufacturer should reasonably expect of an ordinary consumer.

598 So.2d at 1307 (quoting John Kennedy. *A Primer on the Louisiana Products Liability Act,* 49 LA. L. REV. 565, 586 (1989)) (Kennedy was a co-drafter of the LPLA.). Similarly, in *Myers v. American Seating Co.,* 637 So.2d 771 (La. App. 1 Cir. 1994), the plaintiff was injured when a folding chair jackknifed while she was standing on the rear portion of it. The court denied manufacturer liability:

> Although this use may be a conceivable use, it is not a reasonably anticipated use. Most people who use a folding chair as a stepladder utilize the front portion of the seat upon which to stand. . . . . [A]ny danger presented by standing on a folding chair is an obvious danger to a reasonable person.

Myers, 637 So.2d at 779.

Another example is *London v. MAC Corp. of America,* 44 F.3d 316 (5th Cir. 1995), in which a worker fell while standing on the gearbox cover to reach material in a shredder. Pursuant to the LPLA, our court affirmed judgment as a

matter of law at the close of the case for the manufacturer because, "although the use of the gearbox cover as a work station may be conceivable, [the manufacturer] could not reasonably anticipate its use in this fashion". 44 F.3d at 319. Finally, *Delphen v. Dep't of Transp. & Dev.*, 657 So.2d 328 (La. App. 4th Cir. 1995) concerned, *inter alia*, a bicycle manufacturer sued under the LPLA when a quick release allowed the front wheel to separate from the bicycle. In reversing a jury verdict against the manufacturer, the court held:

> Danger imposed by the wheel would have been obvious to a reasonable person who would recognize that the bicycle was a specialized product for sophisticated users, and the ordinary person should inquire into the proper manner of fastening the quick release mechanism before using the bicycle again. Considering the obvious danger posed by the sophisticated bicycle, the fact that [the plaintiff] rode the bicycle across [a] drawbridge without obtaining additional instructions regarding the bicycle's proper use and knowing that the wheel previously had become loose, was not a reasonably anticipated use of the product.

Delphen, 657 So.2d at 333-34.

Likewise, while it is conceivably foreseeable that rig workers might lean pipes toward the mast so they may fall, at issue is whether, under § 9:2800.53 (7), this is the type use that a manufacturer of a racking board "should reasonably expect of an ordinary person in the same or similar circumstances". Restated, the Hunters had the burden of proving that, at the time of manufacture, KREMCO "should [have] reasonably expect[ed] ... [that] an ordinary

user of the racking board would lean the pipes toward the mast as was done the night of the accident. *Lockart*, 989 F.2d at 869.

The well-known standard for judgment as a matter of law is found in FED. R. CIV. P. 50, as defined more fully by *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc). *See United States Fire Ins. Co. v. Confederate Air Force*, 16 F.3d 88, 91 (5th Cir. 1994). Rule 50 (a) (1) provides:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim ... that cannot under the controlling law be maintained ... without a favorable finding on that issue.

And, *Boeing*, 411 F.2d at 37, states:

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the [motion] is proper. On the other hand, if there is substantial evidence opposed to the [motion], that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the [motion] should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.

As stated, at issue is whether the manner in which the pipes were leaned was, to KREMCO at the time of manufacture, a reasonably anticipated ("should [have been] reasonably expect [ed]") use by "an ordinary person in the same or similar circumstances". LA. REV. STAT. ANN. §§9:2800.54 (A), .53 (7). Based on our review of the record, we conclude that this particular use was not reasonably anticipated.

At the time of manufacture, KREMCO was aware of the possibility of negative lean and the attendant risk.[5] Likewise, Danny Ray (rig operator), Charles Berry (rig operator), and Kenneth Willoughby (derrickhand), testified that there were times when 3 1/2 inch pipe (used at the time of the accident) starts to lean toward the masts if a large number of that type are placed in the racking board. In addition, both Tommy Prince (floorhand and derrickman) and Ray testified that they had seen this type pipe racked with a sashcord tied to the rear handrail to secure the pipe.

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[5] Gerald Knoll, the founder of KREMCO, knew at the time the racking board was manufactured that, if pipes were not racked with enough positive lean, they would fall toward the mast. However, Knoll testified that if you start with a proper positive lean, you will "never ... have [the] problem" of pipes growing enough at the top to produce a negative lean; and that "we felt that we were selling to knowledgeable users and that [it] would be the responsibility of the end user to come up with the procedure" for racking the pipe. According to Knoll, KREMCO didn't make any assumptions when it built the racking boards as to how the end user would use them. He testified that he does not think that the manufacturer had a duty to advise the public as to the proper way to use the equipment; that, at the time, KREMCO did not have any information or knowledge about how pipe would be secured in the derrick; and that, although a Canadian regulation instructed that tubes should be secured at the top by means of tie-back ropes or an equivalent device to prevent them from falling out of, or across, the derrick, that statement was directed toward the operator or employer, not the manufacturer.

But while it may be common for this type pipe to have a tendency to grow at the top (lean toward the mast), these witnesses testified that the common practice is that, once the pipes do start to lean, the negative lean is corrected. Their testimony indicates that it is not reasonable, but instead is dangerous and against industry practice, to allow a negative lean to subsist.[6]

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[6] Ray testified that "[j]ust about any time you trip pipe ... it mushrooms at the top. Kind of flares out. Gets bigger." The dissent erroneously draws the conclusion from Ray's testimony that a negative lean is common. Although Ray testified that he had seen pipes racked as depicted in a diagram presented by the Hunters' counsel, Ray could not tell how much those pipes were leaning. Ray testified that if a negative lean occurs, you then "space out the bottom some and it will throw some lean back in once the pipe starts getting too much on you"; that if the lean gets too much toward the mast "that's when you would start your next row"; that you don't want the pipes to lean toward the mast because you don't want them to fall into it; that "you always want the pipe to go to the back". It is unreasonable to conclude from Ray's testimony that a negative lean is commonplace. Ray testified that a negative lean is something you would be worried about and that it is the job of the derrickman to notify people on the ground if there is a problem with the pipes leaning toward the mast.

Berry testified that the normal practice for Mosley and other companies in the industry is to lean the pipes away from the mast, and that this is the safe practice so the pipes will stay in the racking fingers. The dissent states that Berry confirmed that pipes are always tied to the handrails. While Berry testified that he tied pipes to the side or back handrail every time, he neither testified that pipes were always tied to the back handrail, nor that tying negatively leaning pipes to the back handrail was a common or safe practice. And, contrary to the dissent, Berry never described a negative lean as commonplace. He testified that the idea is to have the pipes lean away from the mast, and that you try to lean the pipes away from the mast enough so that when all the pipes are racked, they will still be leaning toward the back of the racking board; that, if you lean pipes toward the mast, you encounter problems. Though Berry testified that there are times when the weight of the pipes gets too much toward the mast, he testified that, if there was trouble with the pipes leaning toward the mast, he would kick the pipes out at the bottom to prevent a negative lean. Berry confirmed that it would concern him if the pipes started leaning toward the mast, because it is not safe. He testified that

Contrary to the Hunters' assertion, the evidence does not allow a reasonable juror to find that leaning the pipes toward the mast was a common occurrence. Kenneth Kaigler, who had worked in the field for over 40 years, testified for the Hunters as an expert in the field of rig operations and safety. When asked if he had "ever seen pipe with a negative lean ... in the racking board", he replied: "... [M]aybe a half a dozen times, not very often. It's not a common deal, but I have seen it." In short, a reasonable juror could not conclude from Kaigler's testimony that a negative lean was a

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footnote 6 continued

it was Hunter's responsibility as derrickman to notify people on the ground of a negative lean so they could kick out the pipes.

Willoughby testified that, according to Mosley's practice, and the practice in the industry, you do not lean pipes toward the mast during the racking process. He testified that anybody with years of experience in the oilfield would know that it is not a safe practice to let pipes lean toward the mast and tie them that way. Willoughby testified that even when pipes are racked all the way to the end of the finger, the pipes should still be leaning away from the mast. He confirmed that the derrickman should notify the people on the ground if the pipes are leaning toward the mast, so the ground crew can either remedy the problem or stop racking. According to Willoughby, the derrickman is the first one to know there is a problem with the lean of the pipes, and he ought to do something to take care of it. Willoughby verified that the only two times when Mosley Well Service has had a pipe swarming incident (the accident in issue and an earlier occasion) is when the pipes were leaning toward the mast.

Although Prince testified that he had seen pipes secured with sashcord on a number of occasions, he did not testify that it was common to lean pipes toward the mast. Prince asserted that Smith (the toolpusher) and Berry (the rig operator) were worried about the lean of the pipes on the night of the accident. He admitted that it is the responsibility of the derrickman to notify the people on the ground if there is a problem with the lean.

common occurrence.[7]

Testimony, in fact, indicates that the lean at the time of the accident was obviously dangerous.[8] Eric Beavers, who was the floorhand on the rig when the accident occurred and was handling the bottom of the pipes, testified that the toolpusher was "raising hell" because the lean of the pipes "was ridiculous".[9] Beavers testified that the toolpusher "ought to have been griping" because the pipes were leaning to the degree that it was dangerous.

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[7] The dissent concedes that Kaigler, the Hunters' own expert witness, testified that negatively leaning pipe was "not common". In determining whether the manufacturer at the time of manufacture should have reasonably expected the dangerous negative lean, Kaigler's expert testimony is of far greater importance than that of the rig workers (who, as the dissent admits, negligently failed to correct the negative lean). Even assuming that Ray and Berry thought that leaning pipes negatively was common, the outcome of the case is no different, because, obviously, "reasonably anticipated use", as applied to KREMCO, is an objective standard. *Daigle*, 598 So.2d at 1307; *Lockart*, 989 F.2d at 867. In other words, what Ray and Berry thought is of little, if any, import; the question is whether, at the time of manufacture, KREMCO reasonably anticipated (objective standard) that the pipes would be leaned toward the mast in a dangerous manner. Restated, the testimony by Ray and Berry is not a basis for determining whether the objective standard is satisfied. No reasonable juror could have found under an objective standard that KREMCO reasonably anticipated when it manufactured the racking board that pipes would be racked with the dangerous negative lean present in this case.

[8] Contrary to the dissent's assertion, we do not seize upon the existence of a mere negative lean. While this type of pipe may have a tendency to lean toward the mast, it was not reasonably anticipated that pipes would be racked with an obviously dangerous negative lean.

[9] Beavers died before trial. Counsel attempted to clarify whether Beavers' deposition testimony was that the lean was "ridiculous" or "dangerous", but the clarification only creates more confusion. This distinction is immaterial; for our purposes, both words convey the same meaning.

The danger of allowing the pipes to lean toward the mast so that they might fall should have been obvious to the ordinary user of racking boards. (This was certainly obvious to the experienced workers at Mosley Well Service. See *Lockart*, 989 F.2d at 868. As shown by their testimony, the Mosley employees knew that it was dangerous, and certainly not the industry practice, to allow the pipes to have negative lean. Furthermore, as noted, Mosley had had a swarming incident prior to the accident in issue. *See Delphen*, 657 So.2d at 333-34.) In light of the unreasonable lean toward the mast, the manner in which the racking board was used was not a reasonably anticipated use.[10]

In sum, the LPLA imposes manufacturer liability only if the accident occurred during a reasonably *anticipated* (manufacturer should have reasonably expected) use, not a reasonably foreseeable use or misuse. *Daigle*, 598 So.2d at 1307; *Lockart*, 989 F.2d at 867 (citing *Daigle*). There is no evidence that it was reasonably anticipated that the pipes would be racked with such a dangerous lean toward the mast.[11] A reasonable juror could not have arrived at a con-

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[10] Expert witness Howard Elwell, Jr., testified that a design by a different manufacturer that incorporated chains in the design "provided insight into the manufacturer's knowledge about pipe-swarming problems and how to control them". But, a reasonable juror could not conclude that the existence of such designs shows that it was reasonably anticipated that pipes would be racked with a negative lean.

[11] Despite the dissent's concern that we do, we do not lose sight of the fact that the standard for reviewing a jury verdict under *Boeing* and subsequent cases is very high; but, on the other hand, we are compelled under *Boeing* to reverse the jury when no reasonable juror could have found that, at the time of manufacture, KREMCO reasonably anticipated the dangerous use to which the racking board was put. It is true, as the dissent states, that the jury could have found the testimony of Ray and Berry

trary conclusion. Therefore, judgment as a matter of law for KREMCO was compelled.

III.

For the foregoing reasons, the judgment is REVERSED and judgment is RENDERED in favor of Knoll Rig & Equipment Manufacturing Co., Ltd.

REVERSED and RENDERED

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footnote 11 continued

credible; however, this is irrelevant because, as noted, nothing in their testimony supports that racking the pipe with the dangerous negative lean present in this case is common or was a reasonably anticipated use of the racking board.

BENAVIDES, Circuit Judge, dissenting:

The majority reviews the evience and concludes that the manner in which the racking board was used was not a "reasonable anticipated use." But because there is evidence from which a reasonable jury could conclude otherwise, I am compelled to dissent.

In reviewing a jury verdict, our standard is clear: we must view all of the evidence in favor of the prevailing party. Weighing the conflicting evidence and the inferences to be drawn from it is the province of the jury; its decision must be accepted if the record contains any competent and substantial evidence tending to support the verdict. *Gann v. Fruehauf Corp.*, 52 F.3d 1320, 1326 (5th Cir. 1995); *Knowlton v. Greenwood Indep. Sch. Dist.*, 957 F.2d 1172, 1178, (5th Cir. 1992). "If there is an evidentiary basis upon which the verdict can be supported, the jury's determinations will be left undisturbed, even where there is substantial contradictory evidence that could have supported an opposite verdict." *Gibraltar Sav. v. LDBrinkman Corp.*, 860 F.2d 1275, 1297 (5th Cir. 1988), *cert. denied*, 490 U.S. 1091 (1989), *accord Knowlton*, 957 F.2d at 1178. I believe the majority loses sight of this standard.

The majority opinion accurately reflects the events surrounding this drilling rig accident. While acting as derrickman, Hunter was maneuvering pipe into a racking board. The floorhands positioned the pipe at ground level. It is undisputed that the pipes were initially given positive lean, albeit less than desirable. Hunter tied the pipe to the back handrail of the racking board with sashcord which, as the majority notes, is common. As each successive pipe was tied

to the previous one, the pipes grew at the top creating a negative lean. The latches on the back handrail failed; the pipes crashed forward; Hunter was killed.

In absolving KREMCO of liability, the majority seizes upon the existence of negative lean and uses it to craft an exclusion from "reasonably anticipated use." In doing so, it usurps the function of the jury and Hunter's right to the jury's decision. In its answer to jury question two, the jury found that Hunter's death was caused by an unreasonably dangerous characteristic of the racking board during a reasonably anticipated use. Given our standard of review, we must uphold this verdict if there exists evidence in the record to support that conclusion, even if there is substantial evidence to the contrary. In this case, there is evidence that both negative lean itself is common and the overall use of the racking board was routine.

At trial, rig operator Danny Ray testified that pipe is always tied to the back handrail. Ray examined a diagram showing negative leaning pipe and testified as follows:

> Q: In looking at this diagram, Mr. Ray, in looking at the way this pipe is racked, is this something that is common to you or at least seen by you out there in your work as an oil well service operator?
>
> A: Yes, sir. Just about any time you trip pipe it always—it's tight at the bottom, but as you (sic) collars butt up against one another you're coming out of it, it mushrooms at the top. Kind of flares

out. Gets bigger.[1]

On cross examination, in direct response to whether it is common practice to lean pipe toward the mast, Ray testified: "You have to kind of do it the way you—to get the job done, you know? Not all wells are perfect and you just kind of gotta do the job the best you can. If you're tripping 12 or 14 thousand foot of pipe and you can space out the bottom some and it will throw some lean back in it once the pipe starts getting too much on you." Further, on redirect Ray was asked: "You have racked pipe with it leaning towards the mast before, haven't you?" Ray responded, "yes, sir, I have."[2]

In addition to Ray's testimony, rig operator Charles Berry testified that when they started tripping the pipe the workers used three to four inches of positive lean. He confirmed that pipe is always tied to the handrails.[3] He also

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[1] The majority argues that because Ray could not quantify the degree of negative lean in the diagram that no reasonable jury could credit this testimony. The majority does not, however, deny that the diagram does illustrate negative leaning pipe and that the diagram, Plaintiff's Exhibit 29.16, was introduced into evidence and was before the jury.

[2] The majority claims that it is unreasonable to conclude from Ray's testimony that negative lean was common. Obviously, the majority is unpersuaded and readily discounts Ray's testimony. I quote from the testimony directly to support my view that a reasonble jury could conclude otherwise.

[3] On cross-examination, Berry was asked: "It's true, isn't it, Mr. Berry, that that handrail isn't meant to take the weight of all that pipe, is it; isn't that true?" Berry replied: "I'm going to put it like this if I may, I have tied pipe to handrails every time I have ever worked derricks on a drilling rig or a workover whether it's from the side handrail or the back handrail." In addition to Ray's testimony that pipe was always tied to the back handrail and Berry's testimony that he always tied to a handrail, derrickman Kenneth Willoughby was asked, "How have you

examined the same exhibit showing negative leaning pipe that Ray described as commonplace and testified that the pipe looked the same way on the day of the accident.[4]

Unquestionably, there is conflicting evidence. Hunter's own expert, Kenneth Kaigler, testified that while he had seen negative leaning pipe it was not common. Likewise there is ample testimony that negative lean could be corrected by "kicking out" the pipe at the bottom. Nonetheless, there remains the testimony of Ray and Berry that a jury could find credible and conclude that the racking board was being used in a manner that was common.[5]

Moreover, the majority's focus on the "tree" of negative lean obscures the "forest" of reasonably anticipated use. The evidence at trial reflects that the pipe was initially being

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footnote 3 continued

secured pipe in the racking board in you 18 years of experience when there wasn't a chain up there to secure it in the racking board?" Willoughby responded: "Tie it off with sash cord or some kind of rope to your back handrail." The majority likewise concedes that "[a]ccording to the testimony, however, pipes are often tied to the back handrail." Maj. op. at 5 n.1.

[4] Berry was asked: "I will refer you to Plaintiff's Exhibit 29.16. Mr. Berry, would you say that the pipe looked about as shown in this illustration that we have marked as Plaintiff's Exhibit 29.16?" He answered: "From my point of angle, yes, sir, that would be just about it right there." The majority erroneously claims that I characterize *Berry* as stating that negative lean was common. It was *Ray* who testified that the diagram showing negative lean was common. Berry merely confirms that the diagram reflected the lean of the pipe on the day of the accident.

[5] The majority claims that in determining whether the manufacturer should have reasonably expected negative lean, Kaigler's testimony "is of far greater importance than that of the rig workers." Maj. op. at 15 n.7. This is precisely the type of interference with the *jury's* province that we should eschew. Despite the majority's unwillingness to find the workers' testimony credible, the jury could. This is especially true given the fact that the founder of KREMCO testified that they did not make *any* assumptions as to how the customer would use the racking board. Maj. op. at 13 n.5.

racked with positive lean. It was secured to the back handrail as was common. As the pipe was being racked, it grew larger as expected. As a result, there was negative lean. At this point, the workers negligently failed to correct the lean. This failure, however, does not lead to the conclusion that the overall use of the board was not a reasonably anticipated one. Rather, the workers' failure to correct the lean speaks to their comparative fault. The jury clearly understood this and found both Hunter and his co-workers partially at fault.[6] The workers' negligence should not, however, insulate KREMCO from its own fault. Viewing the entire context of the use of the racking board prior to the accident, a reasonable jury could conclude that it was being used in a manner that was reasonably anticipated by the manufacturer.

Consequently, I am unpersuaded by the analogy the majority draws with other examples where a manufacturer would not be liable under Louisiana law. At issue here is not a foreseeable, yet bizarre, use of a product such as using a soda bottle as a hammer or driving a car across water. Maj. op. at 9-10. Rather, the evidence reflects that the racking board was being used for its intended purpose (to rack pipe) and in a manner that a jury could conclude was common.

The majority's reliance on *Lockart v. Kobe Steel Ltd. Constr. Mach. Div.*, 989 F.2d 864 (5th Cir. 1993), is also unpersuasive because of its procedural posture. In *Lockart*, two workers lifted a steel pontoon by chaining it to the teeth of the bucket scoop of an excavator. The workers then worked underneath the suspended pontoon. The chain slipped from the teeth dropping the pontoon on the workers. While we

[6] The jury found that Hunter's death was caused by his own negligence and assessed 5% fault to him. It found that his death was also caused by the negligence of employees of Mosley Well Service and apportioned their fault, 35%, against Mosley Well Service.

found that using an excavator to suspend a pontoon was not a reasonably anticipated use, we did so after conducting our own independent review of the evidence as is our standard for summary judgment review. We held that "in this instance in which the manufacturer provided a clear warning, the product was handled by experienced users, and no hard evidence was offered to rebut these facts, we must affirm the judgment of the district court." *Lockart* 989 F.2d at 869. Unlike *Lockart*, in this controversy we review a jury's verdict and must give deference to that verdict if there is support in the record. This is true even if there is substantial contradictory evidence that could support the opposite. We are not free to review the evidence *de novo* and draw our own conclusion on reasonably anticipated use.

Viewing the record in the light most favorable to the verdict, I would conclude that there is some evidence that the jury could credit that negative lean itself is common. Moreover, properly viewed in context, the overall use of the racking board was also routine. The jury found that Hunter's death occurred during this reasonably anticipated use of the racking board. I would stay out of the jury box and affirm.[7]

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[7]Because of the majority's resolution of the anticipated use issue, it did not reach whether the racking board was unreasonably dangerous. Having reviewed the record, I would conclude that there is ample evidence to support the jury's verdict on this issue as well. In an effort not to unnecessarily lengthen this dissent, I would note that there was expert testimony of alternative designs and safety mechanisms, existing at the time of manufacture of the racking board at issue, which would have prevented Hunter's death. This evidence not only supports the jury's conclusion on an unreasonably dangerous product but provides additional evidence from which a reasonable jury could conclude that the manufacturer should have anticipated negative lean; it appears that other manufacturers did.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ILENE THURMAN HUNTER, ET AL	CIVIL ACTION NO. 91-0337
VERSUS	JUDGE STAGG
	REFERRED TO:
KNOLL RIG AND EQUIPMENT MANUFACTURING COMPANY, LTD., ET AL	MAGISTRATE JUDGE PAYNE

FILED
JUL 22 1994

ORDER

For the reasons stated in the foregoing Memorandum Ruling,

IT IS ORDERED that Motion for Judgment as a Matter of Law filed by defendant, Knoll Rig & Equipment Manufacturing Co., Ltd. a subsidiary of the Draco Group of Companies, Ltd., is DENIED.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 22d day of July, 1994.

s/s Roy S. Payne

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ILENE THURMAN HUNTER, ET AL	CIVIL ACTION NO. 91-0337
VERSUS	JUDGE STAGG
	REFERRED TO:
KNOLL RIG AND EQUIPMENT MANUFACTURING COMPANY, LTD., ET AL	MAGISTRATE JUDGE PAYNE

FILED
JUL 22 1994

MEMORANDUM RULING

Defendant, Knoll Rig & Equipment Manufacturing Co., Ltd., a subsidiary of the Draco Group of Companies, Ltd., (hereinafter "KREMCO"), has filed a Motion for Judgment as a Matter of Law contending that the jury's finding that the accident at issue occurred during a reasonably anticipated use of KREMCO's product is manifestly erroneous as a matter of fact and law. Defendant asserts that testimony at trial revealed that leaning the pipe against the mast was not a reasonably anticipated use of the KREMCO monkey board. Additionally, defendants argue that evidence revealed that no part of the rig manufactured by KREMCO experienced

a physical failure which resulted in Mr. Hunter's death. In support of the first contention, defendant relies on *Lockart v. Kobe Steel,* 989 F.2d 864 (5th Cir. 1993). Although *Lockart* correctly points out that the definition of a reasonably anticipated use is narrower in scope than its pre-Louisiana Products Liability Act counterpart, *Lockart* must be distinguished. The court in *Lockart* held that the use of the product was not reasonably anticipated because the manufacturer had clearly warned against the particular use of the product engaged in by plaintiff. Since there have been no allegations made, nor any evidence presented at trial that there ever were any warnings by KREMCO with regard to the use of the racking board, the holding of *Lockart* does not apply.

With regard to defendant's contention that testimony of the Mosley employees revealed that the use was not reasonably anticipated, there was testimony, that the jury might have credited, to the effect that tying the pipe with sash cord and causing it to lean against the mast happened with some frequency. Reasonably anticipated use as defined in La.R.S. 9:2800.53 (7) is "a use or handling of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances". While the standard for reasonably anticipated use is narrower since the adoption of the Louisiana Products Liability Act, the court must consider all of the evidence — not just that evidence which supports the movant's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. *Johnstone v. American Oil Co.,* 7 F.3d 1217 (5th Cir. 1993); *Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir. 1969). Although defendant cites testimony that leaning the pipe toward the mast was improper and unsafe, plaintiff cites testimony that it was a common occurrence. On a

motion for directed verdict, the court must ascertain whether the evidence is such, without weighing the credibility of witnesses *or* considering the weight of the evidence, and that there is substantial evidence from which the jury could find in favor of the party against whom the motion is made. The fact that the court, sitting alone, might have weighed the evidence differently does not matter. *Lewis v. City of Irvine,* 899 F.2d 451 (6th Cir. 1990). Further, a directed verdict should only be granted if the evidence is such that without weighing the credibility of witnesses there can be but one reasonable conclusion. *Hurnon v. Revere Copper & Brass, Inc.,* 494 F.2d 705, 8th Cir. 1974, *cert. denied,* 95 S.Ct. 124, 419 U.S. 867, 42 L.Ed.2d 105 (1974). Further, a directed verdict is inappropriate if there is conflicting evidence. *Bond v. Morton Buildings, Inc.,* 815 F.Supp. 944, (S.D.W. Va. 1993); *Forro Precision, Inc. v. International Business Machines Corporation,* 673 F.2d 1045 (9th Cir. 1982). Because defendant relies on conflicting testimony, judgment as a matter of law is inappropriate.

Additionally, defendant argues that the evidence revealed that there was no physical failure of the part of the rig manufactured by KREMCO. However, under La.R.S. 9:2800.56, plaintiff presented evidence that had KREMCO installed chains on the racking board, it would have prevented the pipe from swarming. It is reasonable to conclude that the jury determined that had KREMCO installed chains on the racking board, the accident would not have occurred. Due to the fact that defendant's contentions are supported by contradictory testimony that necessitated credibility findings by the jury, this court is unable to grant defendant's motion for judgment as a matter of law.

Accordingly, defendant's Motion for Judgment as a Matter of Law is **DENIED.** An Order consistent with this ruling is attached.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 22d day of July, 1994.

/s/ Roy S. Payne

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ILENE THURMAN HUNTER, ET AL	CIVIL ACTION NO. 91-0337
VERSUS	JUDGE STAGG
	REFERRED TO:
KNOLL RIG AND EQUIPMENT MANUFACTURING COMPANY, LTD., ET AL	MAGISTRATE JUDGE PAYNE

FILED
JUL 20 1994

AMENDED JUDGMENT

In accordance with the foregoing Memorandum Ruling, the Judgment rendered on May 13, 1994 is hereby **AMENDED** to read as follows:

IT IS ORDERED AND ADJUDGED that there be judgment in favor of plaintiffs, Ilene Thurman Hunter, Melissa Ilene Hunter, Michael Christopher Hunter, Claude Kenneth Hunter, Jr., Kathy Michelle Hunter and Donnovan Blaine Hunter, and against Knoll Rig & Equipment Manufacturing Co., Ltd., a subsidiary of Draco Group of Companies, Ltd. and National Union Fire Insurance Co. of Pittsburgh, PA in the amount of Six Hundred Fifty-two Thousand,

Ninety-Three and 50/100 Dollars ($652,093.50), together with interest from date of judicial demand and all costs of this proceeding.

IT IS FURTHER ORDERED AND ADJUDGED that the intervention of Fidelity & Casualty Company of New York be recognized in accordance with the Stipulation filed on May 2, 1994, and that Intervenors be entitled to payment by preference and priority in the amount of Fifty-Seven Thousand, One Hundred Fifty-Nine and 60/100 Dollars ($57,159.60) from the Judgment rendered above in favor of Ilene Thurman Hunter, et al., together with the interest attributable to such amount from date of judicial demand. Costs of the intervention are awarded against Knoll Rig & Equipment Manufacturing Co., Ltd.

IT IS FINALLY ORDERED AND ADJUDGED that the credit due to Intervenors against future worker's compensation obligations shall be in accordance with the Stipulation filed into the record on May 2, 1994 which is recognized and incorporated herein by reference.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 19th day of July, 1994, *nunc pro tunc* to May 13, 1994.

/s/ Roy S. Payne

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ILENE THURMAN HUNTER, ET AL	CIVIL ACTION NO. 91-0337
VERSUS	JUDGE STAGG
	REFERRED TO:
KNOLL RIG AND EQUIPMENT MANUFACTURING COMPANY, LTD., ET AL	MAGISTRATE JUDGE PAYNE

FILED
MAY 13 1994

J U D G M E N T

This matter having come on for jury trial on May 2-9, 1994, the Honorable Roy S. Payne, United States Magistrate Judge presiding, and a jury having returned its verdict in Open Court on May 9, 1994;

IT IS ORDERED AND ADJUDGED that there be judgment in favor of plaintiffs, Ilene Thurman Hunter, Melissa Ilene Hunter, Michael Christopher Hunter, Claude Kenneth Hunter, Jr., Kathy Michelle Hunter and Donnovan Blaine Hunter, and against Knoll Rig & Equipment Manufacturing Company in the amount of Six Hunderd Fifty-two Thousand, Ninety-three and 50/100 Dollars ($652,093.50), together

with interest from date of judicial demand and all costs of this proceeding.

IT IS FURTHER ORDERED AND ADJUDGED that the intervention of Fidelity & Casualty Company of New York be recognized in accordance with the Stipulation filed on May 2, 1994, and that Intervenors be entitled to payment by preference and priority in the amount of Fifty-Seven, Thousand, One Hundred Fifty-Nine and 60/100 Dollars ($57,159.60) from the Judgment rendered above in favor of Ilene Thurman Hunter, et al., together with the interest attributable to such amount from date of judicial demand. Costs of the intervention are awarded against Knoll Rig & Equipment Manufacturing Company.

IT IS FINALLY ORDERED AND ADJUDGED that the credit due to Intervenors against future worker's compensation obligations shall be in accordance with the Stipulation filed into the record on May 2, 1994 which is recognized and incorporated herein by reference.

THUS DONE AND SIGNED at Shreveport, Louisiana, on this the 13th day of May, 1992.

/s/ Roy S. Payne

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ILENE THURMAN HUNTER, ET AL	CIVIL ACTION NO. 91-0337
VERSUS	JUDGE STAGG
KNOLL RIG AND EQUIPMENT MANUFACTURING COMPANY, LTD., ET AL	REFERRED TO: MAGISTRATE JUDGE PAYNE

FILED
MAY 9 1994

JURY VERDICT FORM

1.

Do you find by a preponderance of the evidence that, at the time the racking board of the workover rig left KREMCO's control, it was unreasonably dangerous in design, or because of an inadequate warning or breach of an express warranty?

YES ✓ NO ___

(If your answer is YES, proceed to question 2.

If your answer is NO, have your foreman sign this form on the next page and do not answer questions 2-7.)

2.

Do you find by a preponderance of the evidence that Mr. Hunter's death was caused by an unreasonably dangerous characteristic of the racking board during a reasonably anticipated use of that product?

YES ✓ NO ___

(If your answer is YES, go to question 3. If your answer is NO, have your foreman sign at the end of this form.)

3.

Do you find by a preponderance of the evidence that Mr. Hunter's death was caused by his own negligence?

YES ✓ NO ___

4.

Do you find by a preponderance of the evidence that the latches of the racking board possessed an unreasonably dangerous characteristic?

YES ✓ NO ___

Do you find Mr. Hunter's death was caused by an unreasonably dangerous characteristic of the latches?

YES ✓ NO ____

(If your answer is NO, skip questions 6 and 7 and go directly to question 8.)

6.

Do you find by a preponderance of the evidence that R. L. Long Company caused any unreasonably dangerous characteristic of the latches of the racking board?

YES ✓ NO ____

7.

Do you find by a preponderance of the evidence that Mosley Well Service caused any unreasonably dangerous characteristic of the latches of the racking board?

YES ____ NO ✓

8.

Do you find by a preponderance of the evidence that Mr. Hunter's death was caused by the negligence of any employees of Mosley Well Service other than Mr. Hunter?

YES ✓ NO ____

If you answered NO to question 3, you must put a zero in the blank for Mr. Hunter. If you answered NO to either question 4, 5, or 6, you must put a zero in the blank for the R. L. Long Company. If you answered NO to either questions 4, 5, or 7, and NO to question 8, you must put a zero in the blank for Mosley Well Service. Express, in terms of a percentage, the degree of KREMCO's fault or negligence, and any fault or negligence you find attributable to any person or entity for whom you have not already entered a zero percentage. The total must equal 100 percent.

(a)	30 %	KREMCO
(b)	5 %	Mr. Hunter
(c)	30 %	R. L. Long Company
(d)	35 %	Mosley Well Service

(Please have your foreman sign and date this form on the lines below.)

5/9/94 /s/ Illegible

FOREMAN

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40822

FILED
MAR 28 1996

ILENE THURMAN HUNTER, obo Kathy Michelle Hunter, Claude Kenneth Hunter, Jr., Michael Christopher Hunter, and Melissa Ilene Hunter and Donnovan Blaine Hunter.

Plaintiffs-Appellants
Cross-Appellees,

versus

KNOLL RIG &
EQUIPMENT MANUFACTURING CO., LTD.,
A Subsidiary of Draco Group of Companies, Ltd,
Et Al.,

Defendants-Appellees
Cross-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 29, 1995, 5 Cir., 70 F.3d 803)

Before SMITH, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED. Alternatively, we are asked most belatedly to certify this case to the Louisiana Supreme Court. We DENY that request as well. We are not persuaded that this opinion reflects any large policy choices. Rather, our holding is case specific, responding to unique factual circumstances. Specifically, we conclude only that the manufacturer could not expect the gross and unusual "handling" of its product that occurred. We do not insist that under Louisiana law a manufacturer can "expect" only uses of a product that are common. LA. REV. Stat. ANN. §§ 9:2800.54 (A) & .53 (7).

BENAVIDES, Circuit Judge, dissenting from denial of rehearing and en banc review:

The majority denies rehearing while at the same time abandoning the legal foundation previously advanced in its opinion. Given the language in the majority's denial of rehearing,[1] I take some solace that the aberrant holding in this case will not be used in the determination of other cases. Undoubtedly, this provides little comfort to Claude Hunter's family. I continue, however, to be baffled by the panel majority's characterization of the use of the racking board as "gross and unusual." Quite simply, the racking board was designed to rack pipe and was being used for exactly that purpose at the time of the accident. And there is evidence to support the jury finding that the manner in which the racking board was used by Hunter and the rig workers that contributed to the accident should have been reasonably anticipated by KREMCO. The workers' negligence should not preclude recovery, but is appropriately a consideration under Louisiana's comparative negligence regime. Hunter's death would have been prevented if KREMCO had incorporated the safety features into its product that other manufacturers did. The jury so found. I would grant the petition for rehearing and dissent from the Court's decision to deny en banc review of this appeal.

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1 "[O]ur holding is case specific, responding to unique factual circumstances
. . . . We do not insist that under Louisiana law a manufacturer can 'expect' only uses of a product that are common."

APPENDIX H

STATUTORY MATERIALS

1. United States Constitution, Amendment VII, entitled "Civil Trials," provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

2. Federal Rule of Civil Procedure 38(a) provides:

> (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

3. Federal Rule of Civil Procedure Rule 50(a)(1) provides:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim ... that cannot under the controlling law be maintained ... without a favorable finding on that issue.

4. Federal Rule of Civil Procedure Rule 50(a)(2) provides:

> Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

5. 28 U.S.C. § 1652 provides:

> **Sec. 1652. State laws as rules of decision**
>
> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

6. The pertinent provisions of the Louisiana Products liability Act, La. Rev. Stat. 9:2800.51, *et seq.*, provide:

> **Sec. 2800.54. Manufacturer responsibility and burden of proof**
>
> A. The manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from a reasonably anticipated use of the product by the claimant or another person or entity.
>
> B. A product is unreasonably dangerous if and only if:

(1) The product is unreasonably dangerous in construction or composition as provided in R.S. 9:2800.55;

(2) The product is unreasonably dangerous in design as provided in R.S. 9:2800.56;

(3) The product is unreasonably dangerous because an adequate warning about the product has not been provided as provided in R.S. 9:2800.57; or

(4) The product is unreasonably dangerous because it does not conform to an express warranty of the manufacturer about the product as provided in R.S. 9:2800.58.

C. The characteristic of the product that renders it unreasonably dangerous under R.S. 9:2800.55 must exist at the time the product left the control of its manufacturer. The characteristic of the product that renders it unreasonably dangerous under R.S. 9:2800.56 or 9:2800.57 must exist at the time the product left the control of its manufacturer or result from a reasonably anticipated alteration or modification of the product.

D. The claimant has the burden of proving the elements of Subsections A, B and C of this Section.

Sec. 2800.53. Definitions

.....

(7) "Reasonably anticipated use" means a use or handling of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances.

.....

Sec. 2800.56. Unreasonably dangerous in design

A product is unreasonably dangerous in design if, at the time the product left its manufacturer's control:

(1) There existed an alternative design for the product that was capable of preventing the claimant's damage; and

(2) The likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product. An adequate warning about a product shall be considered in evaluating the likelihood of damage when the manufacturer has used reasonable care to provide the adequate warning to users and handlers of the product.

Sec. 2800.57(A). Unreasonably dangerous because of inadequate warning

A. A product is unreasonably dangerous because an adequate warning about the product has not been provided if, at the time the product left its manufacturer's control, the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.

7. Louisiana Civil Code article 2323 provides:

Art. 2323. Computation of damages

When contributory negligence is applicable to a claim for damages, its effect shall be as follows: If a person suffers injury, death or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the claim for damages shall not thereby be defeated, but the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss.

No. 96-12 (2)

Supreme Court, U.S.
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AUG 1 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

ILENE THURMAN HUNTER, on behalf of KATHY MICHELLE HUNTER, CLAUDE KENNETH HUNTER, JR., MICHAEL CHRISTOPHER HUNTER, MELISSA ILENE HUNTER and DONOVAN BLAINE HUNTER,

Petitioners,

vs.

KNOLL RIG AND EQUIPMENT MANUFACTURING COMPANY, LTD. (a Subsidiary of DRACO GROUP OF COMPANIES, LTD.) and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,

Respondents,

vs.

FIDELITY AND CASUALTY COMPANY OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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53 pp

RULE 14(B) STATEMENT AND RULE 29.6 STATEMENT

All parties in the Court of Appeals are listed in the caption of this case. Respondent, Knoll Rig and Equipment Manufacturing Company, Ltd. (KREMCO) was formerly a subsidiary of Dreco* Group of Companies, Ltd.; however, KREMCO recently merged with Dreco, Inc., a Texas corporation. Dreco, Inc. is a wholly owned subsidiary of Dreco Energy Services, Ltd., a Canadian corporation. KREMCO had no subsidiaries.

Respondent, National Union Fire Insurance Company of Pittsburgh, Pennsylvania is a subsidiary of American International Group, Inc. The following are non-wholly owned subsidiaries of National Union Fire Insurance Company of Pittsburgh, Pennsylvania: AIG Europe, S.A.; Eurinvest Finance, S.A.; AIG Realty, Inc.; AIU Insurance Company; American International Insurance Company; Tokyo Private Emergency Center K.K.; American International Specialty Lines Insurance Company; American International Underwriters Overseas Association; Pacific Ocean Leasing; Winkle Enterprises; Lexington Insurance Company; J.I. Accident & Fire Insurance Company, Ltd.; United Guaranty Corporation; and United Guaranty Residential Insurance Company.

---

* Petitioners have erroneously referred to Dreco as "Draco" in their application.

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APPENDIX

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REASONS FOR DENYING THE WRIT

A. Federal Law Issues

This is a case involving the state law of Louisiana, based upon the Louisiana Products Liability Act (hereafter, LPLA), LSA R.S. 9:2800.51, *et seq.* Originally filed in state court, the case was thereafter removed by respondent herein, KREMCO, pursuant to diversity jurisdiction.

In their writ application to this Court, the petitioners have provided a description of the accident which forms the basis of the litigation, that occurrence being an oilfield accident which happened on August 29, 1990. Without repeating that description in its entirety, the accident occurred as a result of oilfield pipe being "leaned" in the wrong direction while being "racked" into the racking board of the rig originally manufactured by KREMCO (significant changes had been made by others to the product, but these are outside the scope of the issues now before this Court).

Due to the improper and uncorrected lean of the pipe, KREMCO's primary defense to the case has always been based upon an assertion that the product was not being subjected to a "reasonably anticipated use" as required under the LPLA. Every discovery deposition taken in the case which pertained to the matters of liability (some of which were introduced as evidence at trial) involved extensive questioning on this issue, and every liability witness who appeared live at trial was examined and cross-examined as to same.

Respondent is fully confident petitioners would agree that the crux of KREMCO'S defense was based upon the improper and uncorrected lean of the pipe as being a "use" which could not have been "reasonably anticipated" under the LPLA. Indeed,

petitioners so stated during the trial itself — at page 857 of the transcript (A. 12a), in response to an objection made by counsel for respondent to attempted rebuttal testimony from one of petitioners' own witnesses, counsel for petitioners asserted that, "Your Honor, the defendants have been — *that's all their case has been on defense, has been the lean of the pipe"* (emphasis added). Significantly, the Fifth Circuit Court of Appeals reversed in favor of KREMCO based solely upon a finding that the uncorrected lean of the pipe was a "gross and unusual" handling of the product and could thus not be reasonably anticipated (*see* Fifth Circuit original panel opinion and opinion denying rehearing). The full import of this admission by petitioners as to the nature of respondent's defense in the trial court will be shown *infra*.

Apparently as an afterthought, petitioners have raised in their writ application to this Honorable Court, and *for the first time ever in these proceedings,*[1] an alleged violation of Federal Rule of Civil Procedure 50. Specifically, petitioners allege that respondents, in the trial court, failed to state on the record that the ground for their motions for judgment as a matter of law was insufficient evidence of "reasonably anticipated use". Petitioners maintain that under Rule 50(a)(2), this should have precluded the Fifth Circuit Court of Appeals from reviewing and reversing the jury verdict based upon the sufficiency of the evidence.

---

1. Petitioners did attempt to bring this issue to the attention of the Fifth Circuit *after rehearing had been denied.* That court declined to file such pleadings, responding to petitioners' counsel that it had already ruled and would thus take no further action.

Based upon FRAP 28(a)(3) and (a)(6), it has been held that any issues not briefed or argued in the appellate court are waived; *See Yohey v. Collins,* 985 F.2d 222, 225 (5th Cir. 1993). As such, and for the other reasons set forth in this brief, this Court should likewise consider the matter waived and deny petitioners' writ application.

Although petitioners admit that they never raised these issues in the courts below, they cite *absolutely no authority whatsoever* which would allow such to be raised for the first time in this Court. Additionally, petitioners do not assert that they would or could have done anything differently in the trial court regardless of the Rule 50 issue they now assert.

At the outset, Supreme Court Rule 10, which provides that writs of certiorari will be granted "only for compelling reasons", should also be mentioned. While respondent acknowledge that this Rule is non-exclusive in nature, it should be noted that the present dispute does not fall within the listed parameters. Thus, no "compelling reasons" are presented which should warrant review by this Court.

Returning to the aforementioned indication that petitioners have never before complained of any non-compliance with Rule 50, it is important to note that they have had *multiple opportunities* to do so, as follows: (1) during the trial itself; (2) in response to respondent's written post-trial judgment as a matter of law presented to the trial court; (3) in response to respondent's appeal to the Fifth Circuit; (4) in oral argument to the Fifth Circuit; (5) as part of either their petition for rehearing, or their suggestion for rehearing en banc, in the Fifth Circuit. If petitioners truly felt that their constitutional rights were being ignored or adversely affected, or if they truly felt that the Fifth Circuit was "without power" to review the issues asserted by respondent on appeal, they most assuredly would have loudly protested below.

Not only did petitioners make no such protest, they have at all times continued to assert the that the evidence adduced at trial *was sufficient* to support the issues they felt were favorable to them, *including* the issue of reasonably anticipated use. In addition to numerous arguments made supporting the

sufficiency of the evidence itself, petitioners previously set out, at page 11 of their reply brief in the Fifth Circuit, what they asserted to be the appropriate standard of review in this matter:

> The proper standard for reviewing a jury verdict was recently stated by [the Fifth Circuit] in *Prestenbach v. Rains*, 4 F.3d 358 (5th Cir. 1993). . . .

The court in *Prestenbach* stated and applied the standard of review set forth in *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc) which is the "sufficiency of the evidence" standard. Significantly, the majority in *the Fifth Circuit applied exactly this standard of review, just as petitioners had requested* (see panel opinion in this matter, 70 F.3d 803 at page 808, citing *Boeing, supra)*. Obviously, therefore, petitioners have already conceded that this case is properly controlled by, and was properly reviewed at the Fifth Circuit by, the standard of "sufficiency of the evidence".

Based upon the foregoing alone, respondents assert that petitioners have waived any right they may have had to now assert a Rule 50 issue. Out of an abundance of caution, however, further explanation will be provided to show that their position is not well-founded in fact or in law.

Specifically, petitioners' newly-created issue is based upon the assertion that respondents did not assign reasons for their motions for judgment as a matter of law in open court, said motions having been made at the close of petitioners' case and at the close of all the evidence. The grounds they have set forth, however, are entirely transparent and, in fact, self-contradictory. While it is true that reasons were not orally stated by respondents "on the record" simultaneously with the motions, this is not dispositive under the circumstances of this particular case and,

indeed, respondents are perplexed by the nature of the petitioners' argument.

The primary purpose in stating reasons for Rule 50 motions is to prevent "ambush", and to make one's opponent aware of any defects in his case so that he will have an opportunity to cure same prior to submission to the jury; *see Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018, 1025 (5th Cir. 1979). Thus, it follows that if one's opponent is indeed advised of grounds for the motion, whether in open court or not, or if he is otherwise aware of such, both the purpose and spirit of the rule have been fulfilled.

The above is why respondents are perplexed — *petitioners have additionally admitted that, at the close of their case and at the close of all the evidence in the trial court, they were indeed aware of the bases for respondent's motions.* In their Suggestion for Rehearing En Banc to the Fifth Circuit Court of Appeal, at page 3, petitioners made the following statement:

> At the close of the Plaintiffs' case, and after all evidence had been admitted, KREMCO moved for judgment as a matter of law *contending that Hunter's death was not caused during a "reasonably anticipated use" of the racking board, and that the racking board was not unreasonably dangerous.* Each motion was denied by the Magistrate. (emphasis added)

One must therefore wonder how a complaint can now be validly made that they did not possess such knowledge at the times indicated —if that knowledge was not obtained from respondents, from whom was it obtained?

Although not crucial to a resolution of this issue for reasons which will be explained later in this brief, the transcript of the proceedings in the trial court shows that, at the close of the petitioners' case, counsel for respondents requested a conference with the trial judge, Magistrate Judge Roy Payne (who presided pursuant to the parties' prior consent), and that such a conference was indeed held off the record during a recess (Tr. beginning at page 528; A. 6a). This conference was brief, but several matters were discussed, both on behalf of plaintiffs and KREMCO, including the motions at issue and some evidentiary matters. Judge Payne's comments at that time indicated to respondents that he was not inclined to grant any motions which would take issues away from the jury.

That motions for judgment as a matter of law were indeed discussed during this recess is obvious from page 532 (A. 10a) of the transcript — after discussing some evidentiary matters pertaining to one of plaintiffs' exhibits, the Court inquired of counsel for respondents, without having to be reminded, in the following manner:

> THE COURT: YOU HAD MADE REFERENCE, MR. RANEY, TO SOME MOTION, I BELIEVE, THAT YOU WANTED TO MAKE AT THE NEXT RECESS. THIS IS THE NEXT RECESS.
>
> MR. RANEY: YES, SIR, WE WOULD MOVE TO DISMISS AT THIS TIME ON A DIRECTED VERDICT, YOUR HONOR.
>
> THE COURT: ALL RIGHT, I'LL CONSIDER THAT MOTION AS HAVING BEEN MADE AN DENIED, AND WE WILL BE IN RECESS FOR THE NEXT 20

MINUTES TO ALLOW YOU TO PREPARE FOR YOUR CASE IN CHIEF.

Indeed, *counsel for petitioners have never stated to this Court that they were not aware of the reasons underlying the motions*— as above, their only present complaint appears to be strictly technical in nature, *i.e.*, that such reasons were not stated "on the record".[2]

True to what had been indicated by the trial judge, he denied the motion perfunctorily — neither he nor counsel for petitioners requested any further discussion or explanation in open court. Significantly, however, *Judge Payne considered the motion as "having been made"* — there was no indication that the motion was defective because reasons were not assigned, nor did counsel for petitioners indicate any confusion as to the basis for such.

At the close of all the evidence, respondents indicated that they wished to re-urge their prior motion. Rather than giving full consideration to the motion at that juncture, however, the trial court again dealt with the matter perfunctorily by merely stating, "The motion for judgment as a matter of law will be noted and denied at this time" (Tr. 891; A. 13a).

Subsequently, respondents filed a written post-trial motion for judgment as a matter of law. The entirety of the foregoing is thus in complete accord with Rule 50(b), which states that if the motion at the close of all the evidence is not granted for any

2. In their untimely submission to the Fifth Circuit after denial of rehearing (*see* footnote 1 above), petitioners did suggest that they were unaware of such underlying reasons. Notably, this suggestion has been deleted from their application to this Court — it can only be assumed that, in the interim, petitioners have more carefully reviewed their Fifth Circuit brief, wherein they admit that they were in fact aware of those grounds. The relevant portion of that brief has been reproduced in the text of this writ opposition.

reason, the court is "considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion".

Moreover, it is patently clear from a reading of the panel opinion of the Fifth Circuit that the record in this case was carefully scrutinized by both the majority and the dissenting judge. Obviously, the Fifth Circuit saw no Rule 50 problem in the record —the court either concluded that there had been compliance with Rule 50, or that any noncompliance was merely "technical" in nature and thus excused such due to the circumstances in which the motions for judgment as a matter of law were made or the manner in which they were handled by the trial judge, or that the right to complain about any violation of Rule 50 had been waived because of petitioners' failure to assert same.[3]

---

3. Along with other courts, the Fifth Circuit has acknowledged that Rule 50 is a "strict one"; however, it has taken a "liberal view" of what constitutes a valid motion under that rule. *See Quinn, supra,* 597 F.2d at 1025.

In *Hall v. Savings of America,* 68 F.3d 470 (5th Cir. 1995)(unpublished), *cert. denied,* __U.S.__, 116 S. Ct. 1265, 134 L. Ed. 2d 213 (1996), as in other Fifth Circuit cases, technical noncompliance with Rule 50 has been excused where, for example, the trial judge "cuts off" counsel while moving for judgment as a matter of law or otherwise makes it clear that a detailed explanation of the reasons for the motion would not be welcomed or required by the Court. In the instant case, the record reveals that the trial judge dealt with KREMCO's motion summarily by stating that he "consider[ed] that motion as having been made and denied," without asking for a response from plaintiffs' counsel or otherwise truly "hearing" the motion. Any noncompliance was therefore at least somewhat invited and thus excused, as the Fifth Circuit could surely have concluded.

See also Merwine v. Bd. of Trustees, 754 F.2d 631 (5th Cir. 1985), and *Bohrer v. Haines Corp.,* 715 F.2d 213 (5th Cir. 1983), *cert. denied,* 465 U.S. 1026, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984), illustrating that noncompliance with Rule 50 can be excused.

Had the Fifth Circuit been concerned about a Rule 50 problem, the panel certainly would have raised it *sua sponte* at oral argument or dealt with it in the opinion. At the very least, the dissenting judge would have directly and succinctly pointed this out in his dissent.

In *Neely v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967), this Court dealt with similar Rule 50 issues (specifically, new trial) in the context of waiver. *Neely* will be discussed in greater detail *infra*, but in conjunction with the above, it is noteworthy that even though this Court considered it "incumbent on the Court of Appeals to consider the new trial question in light of its own experience with the case", the Court further stated that:

> . . . we will not assume that the court ignored its duty in this respect, although it would have been better had its opinion expressly dealt with the new trial question. [386 U.S.at 330, 18 L.Ed.2d at 85].

Likewise, this Court should not assume that the Fifth Circuit ignored its duty under the circumstances presented in the instant matter.

Insofar as discussion between the trial court and counsel, the subject of "reasonably anticipated use" did not come up again until near the close of the trial during the final jury charge conference, when *counsel for plaintiffs/petitioners stated that the issue of "reasonably anticipated use" should not be a jury issue.* This discourse appears at page 765 (A. 11a) of the transcript, the significant portion of which is as follows:

> Mr. Royer: . . .First and foremost, we believe that *it's a matter of law* for Your Honor that there are no facts over which

> reasonable minds could differ that they were involved in a reasonably anticipated use of this product at the time; therefore, *it is our position that the reasonably anticipated use issue should not be tendered to the jury,* and I'll cite to Your Honor—defendants had cited Lockart versus Kolb [sic] Steel. . . . [emphasis added].

Petitioners' counsel then went on to argue that *Lockart v. Kobe Steel Ltd. Const. Mach. Div.*, 989 F.2d 864 (5th Cir. 1993), upon which respondents have always placed primary reliance and upon which the Fifth Circuit relied heavily for its reversal, is "entirely different" from the factual situation at hand. Arguably, the above quoted statement by petitioners rose to the level of an express waiver, and should be viewed as consent to remove this issue from the province of the jury.[4]

Of course, the Court had already indicated on one occasion, as noted above, that all such issues would be given to the jury, and had ruled in conformity therewith at the close of plaintiffs' case. At the close of all the evidence, however, defendants-respondents re-urged their prior motion, and again, same was perfunctorily denied by the magistrate judge. However, at page 891-892; A.14a) of the transcript, plaintiffs' counsel spoke up to nevertheless provide further argument:

---

4. *See and compare Zaks v. Elliott,* 106 F.2d 425, 427 (4th Cir. 1939), an early Rule 50 case. In *Zaks,* defendant had moved for a directed verdict, and the court stated that plaintiffs "were likewise anxious to have the case decided as a question of law by the court". Accordingly, the appellate court treated the case as one in which the parties had agreed not to have a jury.

Although *Zaks* dealt with a situation where the entire case was withdrawn from the jury, its rationale should be equally applicable to the question of whether particular issues can be withdrawn from the jury as questions of law, thus obviating any Seventh Amendment protection.

> Mr. Posey: . . . And also, as to the issue of reasonably anticipated use, it's our contention still that is not within what is contemplated by the law. The facts of this case clearly constitute a reasonably anticipated use of this product and, therefore, that particular instruction should be given to the jury.

In keeping with his prior indication that no such motions would be granted, the Court denied this motion as well.

The above discourse nevertheless shows that petitioners continued to assert that "reasonably anticipated use" was *not* a jury issue, to the extent of requesting that the Court directly charge the jury that the "use" of Kremco's product was, as a matter of law, "reasonably anticipated". For petitioners to now claim that their constitutional rights have been infringed — an argument which must necessarily be based upon the self-contradictory acknowledgment that the Fifth Circuit *agreed* with them that this was not a jury issue —is unimaginable.

As stated above, respondents renewed their motions made during the trial by filing a written motion after the jury verdict in accord with FRCP 50(b). With respect to the issue of reasonably anticipated use, primary reliance was based upon *Lockart, supra*, and *Daigle v. Audi of America, Inc.*, 598 So.2d 1304 (La. App. 3d Cir. 1992) — *the same cases previously set forth in proposed jury instructions and argued in discussions with the magistrate judge during trial.*

Quite significantly, *at no time in responding to that written motion did petitioners raise a Rule 50 problem.* It is thus asserted that when petitioners failed to object to the filing of this motion and/or to raise a Rule 50 issue at that time, they waived their right to do so thereafter — even if the prior oral motions could have

been considered defective, which is denied, or even if no off-the-record conference with the trial judge had occurred, the defect was thus cured; *see Whelan v. Abell,* discussed *infra.*

Of course, the trial judge evaluated this post-trial written motion and, as he had done during trial, denied same. This is important, however, since his action in doing so leads to an inevitable conclusion — *even if additional detailed argument had been made by respondents "in open court", the motion would still have been denied. In other words, it is clear that no "reasons" provided to the trial judge at any time were going to change his mind on this issue.*

Also very significant is that *at no time* — not during trial, nor in response to the written post-trial motion, nor in the Fifth Circuit (even on request for rehearing), and tellingly, *not even in their writ application to this Court* — have petitioners even attempted to assert that the failure of respondent to state Rule 50 reasons "in open court" would have caused them to change or add to anything which occurred during the trial. The explanation for this is, of course, simple — nothing could have been changed anyway, because *the vast majority of the evidence developed by respondents on the issue of "reasonably anticipated use" was accomplished through cross-examination of petitioners' own witnesses.*

Each and every one of Mr. Hunter's co-employees testified that the "use" of KREMCO's product on the day of the accident was known by the crew, including Mr. Hunter, to be dangerous, unnecessary, and against industry practice, and petitioners' own expert, Ken Kaigler, stated that such was "not a common thing" (the pertinent testimony of these witnesses is contained in footnotes in the original Fifth Circuit opinion). In other words, because their own witnesses had testified against them on this issue, there was nothing else petitioners could have done to "cure any defects" in their case.

In accord with the foregoing, it is also important to note that petitioners never made any request for a new trial in the lower courts.[5] If they felt that they had been "surprised" or "ambushed" by the motions for judgment as a matter of law and needed to "cure defects" in their case, the time to assert such would have been in response to respondent's written post-trial motion in the trial court or at some point in the Fifth Circuit — yet they never did so, *even when applying for rehearing in that court, and have not done so in their writ application to this Court.*

Undeniably, petitioners' failure to request a new trial clearly shows their acknowledgement that there was no "ambush", and that no new evidence could have been adduced in support of the issue of "reasonably anticipated use". In turn, this provides a further basis supporting their waiver of any supposed Rule 50 problems.

That the right to a jury trial can be waived is axiomatic. Although this Court's opinions in *Slocum v. New York L. Ins. Co.*, 228 U.S. 364, 33 S.Ct. 523 (1913), and *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 55 S.Ct. 890 (1935),[6] are pre-Rule 50 cases, both stand for the proposition that the right to a trial by jury as provided by the Seventh Amendment can be waived, either expressly or impliedly (*see, e.g.*, 295 U.S. at 657, 55 S. Ct. at 891). Thus, if the right to a jury can itself be waived, it is also axiomatic that compliance with Rule 50 can be waived as well.

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5. Nor did petitioners, in accord with Rule 50(d), assert any grounds, as appellee in the circuit court, entitling them to new trial.

6. Rule 50(b) as originally drafted was apparently implemented in direct response to the holding in *Baltimore & Carolina Line*, and made clear that when a motion for directed verdict was not granted, the court was deemed to have submitted the case to the jury subject to the court's later deciding the legal questions raised by the motion; thus, the Seventh Amendment was not implicated because the case was only provisionally given to the jury. This is what occurred in the present matter.

Indeed, later cases which have specifically dealt with Rule 50 problems have held that Rule 50 does *not* implicate the Seventh Amendment; *see Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S. Ct. 189 (1940). Although petitioners cite extensively to *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947), and *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 68 S. Ct. 246, 92 L. Ed. 177 (1948), as supposed support for their position, neither of those decisions even mention the Seventh Amendment. Both *Cone* and *Globe Liquor* dealt with situations in which the alleged Rule 50 violation was a failure to move for judgment notwithstanding the verdict (JNOV), and in which the issue was whether the appellate court could reverse and render judgment or whether it was limited to remanding for a new trial; both held the latter. That is not the issue in the present case — moreover, at no time have petitioners herein requested a new trial, nor have they asserted any grounds for same. *See Neely, supra.*

A brief review of the underlying rationale in the above cases, however, provides an interesting comparison to the present context. In *Cone*, for example, this Court indicated that the importance of making a required motion in the trial court relates to the need for an initial determination by the trial judge since he is the one who "saw and heard the witnesses and has the feel of the case" (330 U.S. 216, 67 S. Ct. at 755). Significantly, *that very scenario has already occurred in the present matter* — respondents' motions for judgment as a matter of law made during trial were renewed in their written post-trial motion, and the trial judge was thus called upon to review the evidence and rule accordingly. The rationale underlying *Cone* and *Globe Liquor*, both of which involved situations in which no JNOV had been made in the trial court, was thus fulfilled; additionally, *petitioners herein made no objection to that written motion, nor did they raise any Rule 50 problem in response.*[7]

7. Aside from *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.

(Cont'd)

The first case from this Court to actually analyze a situation involving waiver in the context of Rule 50 was *Neely, supra.* In that matter, the jury had rendered a verdict in favor of plaintiff, and the trial judge had denied the defendant's motion for JNOV; plaintiff appealed, but did not request or present grounds for a new trial in the event the verdict was not upheld. When the appellate court reversed in favor of defendant, plaintiff submitted a writ which, as in the present matter, asserted only that the appellate court had been without such power and that the verdict of the jury should be upheld.

This Court in *Neely* held that Rule 50(b) does not violate the Seventh Amendment, and that since there is no greater restriction on the province of the jury when an appellate court grants a JNOV than when it is granted by a trial court, there is no constitutional bar to such action by the appellate court. Additionally, and in striking similarity to the case at hand, it was noted that the petitioner, as appellee in that matter, had not suggested any grounds for a new trial in the event of reversal, had not requested a rehearing in the appellate court[8], did not suggest that the record was insufficient to present any new trial issues, and did not suggest any other reason that the case should have been remanded.

Although the petitioner in *Neely* finally suggested, in her

(Cont'd)

Ed. 1188 (1938), and its progeny, the only other United States Supreme Court case cited by petitioners is *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Apparently in an attempt to gain this Court's attention, petitioners give *Anderson* pre-eminent importance in the heading of Section B, page 14, of their writ application — simply stated, *Anderson* was based upon a motion for summary judgment and is thus wholly inapplicable to the case at hand.

8. As previously noted, petitioners in the present matter did request a rehearing in the Fifth Circuit; however, they did not raise a Rule 50 problem at that time.

brief to this Court, that she had a valid ground for a new trial (386 U.S. at 330, 18 L.Ed.2d at 85), the Court stated as follows:

> This matter was not raised in the Court of Appeals or in the petition for a writ of certiorari. . . . Under these circumstances, we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here. Supreme Court Rule 40(1)(d)(2).
>
> Petitioner's case in this Court is pitched on the total lack of power in the Court of Appeals to direct entry of judgment for respondent. We have rejected that argument and therefore affirm.

A similar result should thus be reached in the present matter, where petitioners have never at any time asserted that a new trial would have served any purpose.

In the instant case, the petitioners have never asserted that any such shortcomings existed in their proof, and in fact, have *asserted exactly the opposite* as to the issue of reasonably anticipated use. *If such a defect was felt to exist in their case, they would not have asserted to the Court that this issue should have been taken away from the jury,* and they would certainly have asserted the need for additional evidence when opposing defendants-respondents' written post-trial motion. Even after reversal and entry of judgment in favor of defendants-respondents in the Fifth Circuit, petitioners made no request for a new trial, nor did they otherwise even suggest that any additional proof would have changed the result. Indeed, they have not made any such suggestion in their writ application to this Court.

Turning to circuit court decisions, space limitations do not allow in-depth discussion of all of the cases cited by petitioners. However, at the outset, it should be noted that in *all* of those decisions, Rule 50 problems had been asserted in the circuit court or had already been raised in the trial court, *not* for the first time in this Court.

Most of the cases referenced by petitioners are quite old and/or simply do not involve situations similar to the present matter.[9] For example, petitioners cite *Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171 (3d Cir. 1992), which in turn relied upon *Acosta v. Honda Motor Co., Ltd.*, 717 F.2d 828 (3d Cir. 1983). In *Acosta*, counsel had apparently moved for directed verdict in an off-the-record conference at the close of plaintiff's case. At the close of all the evidence, counsel attempted to renew that earlier motion, but did not adequately state the grounds.

The Third Circuit stated that, standing alone, the latter motion might not have served as a valid prerequisite to a motion for JNOV; however, the court concluded that the "communicative content", "specificity", and "notice-giving" requirement of Rule 50 should be *judged in context* (717 F.2d at 832), and that under the particular circumstances of that case, counsel and the district court clearly understood the grounds for the motion even if such had not been appropriately uttered. Likewise, in *Fineman* itself, the Third Circuit found no violation of Rule 50, and notably, adequacy of the JNOV had been challenged even at the district court level.

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9. Petitioners cite *Hinojosa v. City of Terrell*, 834 F.2d 1223 (5th Cir. 1988), for the proposition that grounds must be stated for a Rule 50 motion in order to preserve such for appellate review. *Hinojosa*, however, had nothing whatsoever to do with whether grounds had been stated; rather, in that case, no Rule 50 motion had been made at all.

In *Jones Truck Lines, Inc. v. Argo*, 237 F.2d 649 (8th Cir. 1956), and in *Friedman v. Decatur Corp.*, 135 F.2d 812 (D.C. Cir. 1943), the courts found that the Rule 50 motions were defective, but also concluded that, under a sufficiency of the evidence standard, the motions had been properly denied.

Other recent appellate court cases have made it clear that where a party conducts itself as have petitioners in the present matter, a waiver of non-compliance under Rule 50 occurs. The latest decision located by respondents on these issues is *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995).[10]

In *Whelan*, the plaintiff had been granted judgment, but the defendant, in a renewed motion for JNOV after trial, asserted for the first time that the *Noerr-Pennington* doctrine barred plaintiff's recovery. This motion was granted by the trial judge, and plaintiff complained on appeal that the doctrine had not been part of defendant's pre-verdict motion. Although plaintiff admitted that this complaint had not been made before, he asserted that the issue was "jurisdictional" in nature and could therefore be raised at any time.

The D.C. Circuit *rejected* the argument that such Rule 50 matters are jurisdictional[11] and, citing *Slocum* and others, *supra*, squarely held that such complaints of Rule 50 non-compliance are clearly waivable (48 F.3d at 1251-1253). Having established that point as a threshold matter, the court went on to hold that, when plaintiff made no objection to the additional grounds upon which defendant's post-verdict motion was based, such constituted a waiver of the right to complain thereafter.

Whelan is directly applicable to the present case on at least two points. These can be stated briefly as follows.

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10. The result in *Whelan* should be compared with an earlier case from the D. C. Circuit cited by petitioners, *Friedman*; *see* n. 9. Obviously, the factual situation in *Whelan* was completely different and much more compelling, as are the facts of the present matter.

11. Likewise, the court in *Virginia-Carolina Tie & Wood Co. v. Dunbar*, 106 F.2d 383 (4th Cir. 1939), expressly stated that, "We doubtless have the power to consider such motion even though the grounds be not stated. . . ."

The above matter was cited by petitioners for the proposition that an appellate court has *no power* to review when Rule 50 has not been followed. Therefore, the case does not stand for the proposition stated by petitioners.

First, petitioners in the instant case made no objection to respondent's written motion for judgment as a matter of law which was filed post-verdict in the trial court. Therefore, even if it could be said that respondent's prior motions made during trial were defective, which is denied, the "additional" grounds contained in the post-verdict motion were added.

Second, the Fifth Circuit in the present matter *granted* the motion for judgment as a matter of law, and thereafter, petitioners failed to make any complaint about alleged Rule 50 violations *even though such could easily have been asserted as part of their petition for rehearing or suggestion for rehearing en banc.* The only difference from *Whelan,* although of no moment, is that in *Whelan,* the motion had been granted by the district court.

For additional cases similar to *Whelan, see Collins v. Illinois,* 830 F.2d 692, 698 (7th Cir. 1987)(defendants did not challenge in the district court, at the time plaintiff moved for JNOV, plaintiff's failure to move for directed verdict, and it was held that this issue could not be raised for the first time on appeal); and *Cox v. City of Freeman, Missouri,* 321 F.2d 887, 891 (8th Cir. 1963)(holding that a directed verdict does not deprive the plaintiff of Seventh Amendment rights; that a constitutional issue not asserted below could not be raised at the appellate level; and that an adverse party who does not object at trial to his opponent's failure to state specific grounds for a Rule 50 motion will not be heard to do so on appeal).

See also Halsell v. Kimberly-Clark Corporation, 683 F.2d 285 (8th Cir. 1982), *cert. denied,* 459 U.S. 1205, 103 S. Ct. 1194, 75 L. Ed. 2d 438 (1983). In that case, the court characterized the defendant's failure to clearly renew its motion for directed verdict at the close of the evidence as a mere "technical" problem being raised for the first time on appeal, and the court refused to allow a belated objection by plaintiff on this point to overcome substantial compliance with Rule 50 (683 F.2d at 294-295). The

present matter, of course, is characterized by a situation even further distant, in that petitioners herein never raised any Rule 50 problems until making their application *to this Court.*

B. State Law Issues

The remaining sections of petitioners' application do nothing more than raise state law issues which do not merit attention by this Court. Nevertheless, petitioners have made various misstatements in this context. Pursuant to Supreme Court Rule 15(2), and out of an abundance of caution, respondent feels it necessary to briefly address these misstatements.

Perhaps the most egregious misrepresentation made by petitioners is in section C.2. of their application, in which they assert that the Fifth Circuit was erroneous in ruling that "reasonably anticipated use" is a threshold element of a product liability plaintiff's case under Louisiana law, and that such is in conflict with other decisions of the Fifth Circuit itself and with Louisiana law in general. Neither aspect of this assertion is correct.

That "reasonably anticipated use" is indeed a threshold element of plaintiff's case has been confirmed by yet another panel of the Fifth Circuit, at least by implication, in *London v. MAC Corp. of America,* 44 F.3d 316 (5th Cir. 1995). In that case, the defendant-manufacturer's motion for judgment as a matter of law was upheld even though plaintiff had based his case on faulty design and failure to warn. Thus, the opinion of the Court of Appeals in the present matter is certainly in accord with other of its decisions —parenthetically, it is noted that petitioners fail to cite any opinions of the Fifth Circuit which they deem to be in disagreement.

Louisiana state court cases are likewise in accord with the foregoing. For example, the court in *Myers v. American Seating*

Co., 637 So. 2d 771 (La. App. 1st Cir. 1994), cited in the original Fifth Circuit opinion in this matter, upheld dismissal of the plaintiff's case based solely upon a finding that the use was not reasonably anticipated under the LPLA, *even though plaintiff had also proved the existence of "alternative designs"; see* 637 So. 2d at 778.

Notably, the only case cited by petitioners' in disagreement with the foregoing is *Delphen v. Dept. of Transp. & Dev.*, 657 So. 2d 328 (La. App. 4 Cir. 1995); instead of being "mainstream" Louisiana law as petitioners suggest, however, *Delphen* is actually the aberration. While *Delphen* is absolutely correct to the extent of its holding on the issue of "reasonable anticipated use" per se, it is incorrect if read to assert that a manufacturer may be held liable based solely by showing that its product contains an "unreasonably dangerous" characteristic. With this in mind, a short historical perspective is in order.

Prior to the LPLA, Louisiana products liability law was dependent upon a non-statutory scheme consisting solely of jurisprudence. The seminal case of modern products liability law in Louisiana was *Weber v. Fidelity & Casualty Co. of N.Y.*, 250 So. 2d 754 (La. 1971). In that case, the Louisiana Supreme Court specifically stated that the plaintiff must prove, *inter alia*, that the product was "unreasonably dangerous to normal use" (250 So. 2d at 755).

Subsequent cases, of course, were required to adopt this test, and it was generally held that a manufacturer could be held liable only if the plaintiff proved *all* the elements of his case, one of which was that the product was in normal use. *See Lanclos v. Rockwell Intern. Corp.*, 470 So. 2d 924, 929 (La. App. 3d Cir. 1985),citing *Weber, supra.*

In other words, since the beginning, Louisiana law has *always* required that the type of use being engaged in by the plaintiff be analyzed as a *threshold matter.* This has not changed under the LPLA — although petitioners enjoy citing the Kennedy article, Mr. Kennedy himself acknowledges that a plaintiff must prove that his damage "arose from a reasonably anticipated use of the product." J. Kennedy, *A Primer on the Louisiana Products Liability Act,* 49 La. L. Rev. 565, 583 (1989). Since 2800.54(D) specifically provides that "The claimant has the burden of proving the *elements* of Subsections A, B, and C of this Section" (emphasis added), it becomes undeniable that under the LPLA, the plaintiff must prove "reasonably anticipated use" *as a threshold matter* and that, absent doing so, he cannot prevail.

Returning to *Delphen* with the above in mind, it should first be noted that the court in that matter *incorrectly stated the content* of Section A of LSA R.S. 9:2800.54 — it is that error out of which the aberration arises, and upon which petitioners herein rely. At page 333 of the decision, the court in *Delphen* paraphrased the content of 2800.54 as follows:

> Plaintiffs must prove that a product is defective if it is unreasonably dangerous in its reasonably anticipated use or that there existed, at the time of the manufacture, a feasible alternative design capable of preventing the injury. [LSA R.S. 9:2800.54(A)].

In actuality, this passage contains at least one other error, pertaining to the concept of "feasibility" of an alternative design under Louisiana law; however, such is outside the scope of the issues under consideration herein.

The pertinent sections of the LPLA have been reproduced in the appendix to petitioners' writ application, so they are not reproduced herein — notably, however, in its *entirety,* section 2800.54(A), in contravention of *Delphen,* actually contains the following language:

> A. The manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product *unreasonably dangerous* when such damage *arose from a reasonably anticipated use* of the product by the claimant or another person or entity. (emphasis added)

Simply stated, *there is nothing in Section A which allows for any alternatives* — instead, the damage caused by any "unreasonably dangerous" characteristic must arise from a "reasonably anticipated use".

It is in section B of 2800.54 that descriptions of factors which can constitute "unreasonably dangerous" characteristics are provided — B(1) provides for problems in construction or composition; B(2) for problems in design; B(3) for problems related to warnings; and finally, B(4) pertains to problems with express warranties. Thus, according to the statutory scheme, one must first substitute from Section B, into Section A, the type of characteristic which is alleged to be "unreasonably dangerous" —however, according to Section A, *regardless of the nature of the unreasonably dangerous characteristic, any damage resulting therefrom must still "[arise] from a reasonably anticipated use".* This is no different than the 25-year-old requirement of *Weber, supra,* and its progeny, except that the LPLA utilizes the narrow, more stringent test ("reasonably anticipated use" rather than mere "normal use").

In view of the foregoing, perhaps *Delphen* should be read simply as an attempt by the court in that matter to show that the plaintiff had no basis upon which to prevail regardless of the arguments made. Conversely, however, to the extent that the analysis in *Delphen* is in conflict with 2800.54(A) — and a simple reading of that court's "version" of Section 2800.54(A) indeed shows obvious conflict — it must be seen as erroneous and not representative of Louisiana law.

Turning to the next point, petitioners state that the majority in the Fifth Circuit made "common use" a requirement of "reasonably anticipated use". This is simply incorrect — *nowhere in the original opinion is such a statement made or implied.* Indeed, it is clear that the majority engaged in discussion of what was or was not "common" in the context of this case only because that issue was asserted by the petitioners themselves and because the dissenting judge commented on such.

At note 6 of the original opinion, 70 F.3d 809, the majority stated, in pertinent part: "The dissent erroneously draws the conclusion from Ray's testimony that a negative lean is common". In the text of the opinion itself, also at page 809, the majority stated: *"Contrary to the Hunters' assertion,* the evidence does not allow a reasonable juror to find that leaning the pipes toward the mast was a common occurrence" (emphasis added).

The majority made it clear, however, in its denial of rehearing and denial of suggestion for rehearing en banc, that a finding of "commonness" is *not* a prerequisite to achieving the legal standard of "reasonable anticipated use". Therein, it was expressly stated as follows:

> Specifically, we conclude only that the manufacturer could not expect the *gross and unusual* "handling" of its product. We do not insist that under Louisiana law a manufacturer can "expect" only uses of a product that are common. (80 F.3d 136 at 137; emphasis added; citations omitted)

As a result, the petitioners' strategy in this regard, *i.e.*, to attempt to "bootstrap" their position by projecting their own faulty arguments as the supposed basis of the majority opinion, is meritless.

For the same reason, petitioners' assertion that the majority of the panel in the Fifth Circuit held that "*any* negligent use or misuse of a product cannot be a 'reasonably anticipated use' " (writ application, page 23) is also erroneous. As made clear above, the majority clearly held that this case was not one of ordinary, simple misuse, but rather one of "gross and unusual" handling of the product.

Next, although petitioners rely heavily upon the article written by Kennedy, they make only passing comment that "it may be true that a few intermediate state courts" have construed the term "reasonably anticipated use" more narrowly than the pre-LPLA term "normal use" (writ application, page 23). Of course, the Kennedy article is not law, but it is nonetheless interesting to note that Mr. Kennedy himself specifically recognizes this change and its significance (49 La. L. Rev 565 at 586). No court in Louisiana has held to the contrary, and indeed, the federal Fifth Circuit has recognized the distinction; *Lockart, supra*, 989 F.2d at 867 (citing, in note 6, the Kennedy article).

In this context, petitioners also cite *Daigle v. Audi of America, Inc.*, 598 So. 2d 1304 (La. App. 3d Cir. 1992), and point

out that the court in that matter referred to the Kennedy article and its analogies. Interestingly, however, petitioners fail to discuss the substance of *Daigle* itself. Indeed, both *Lockart* and *Daigle* were cited *by respondent* herein, KREMCO, *in support of its jury instruction pertaining to the issue of reasonable anticipated use,* as well as in its written post-trial motion for judgment as a matter of law. *Daigle* involved a plaintiff who, with the engine of his vehicle running, reached into an area that vehicle which could not be seen in an attempt to work on it. While it cannot be seriously contended that one is not making a "use" of his vehicle by choosing to attempt to perform maintenance or repairs on it, the court had no difficulty in holding that such was not a reasonably anticipated use, and recovery was thus denied.

Finally, petitioners assert that the result in the Fifth Circuit is contrary to *Bell v. Jet Wheel Blast, Div. of Ervin Ind.*, 462 So. 2d 166 (La. 1985). Again, however, their position is completely erroneous.

The Louisiana Supreme Court in *Bell* held that a plaintiff's ordinary contributory negligence could not be used to completely bar his recovery in a products liability case, and that such ordinary negligence, where applicable based upon policy considerations, must be considered only so far as to allow a reduction of recovery through the application of comparative fault. *Nowhere* is it stated in *Bell* that recovery could not be completely barred where the use of the product was found to be outside "normal use" (the standard existing at the time — the LPLA was not enacted until 1988). Additionally, the Court in *Bell* specifically stated that determinations concerning the application of comparative fault must be made on a case-by-case basis; 462 So. 2d at 172.

Subsequently, the courts of Louisiana have had no difficulty with making such decisions. The state court cases cited elsewhere herein (*Myers, Daigle,* and, on this issue only, *Delphen, supra*) which, notably, are post-*Bell* and cited in the Fifth Circuit's decision in this matter, all stand for the proposition that some uses of a product are so far outside a manufacturer's expectation that no recovery should be allowed — the Fifth Circuit held likewise, finding the use of respondent-Kremco's racking board to have been "gross and unusual".

It is respectfully submitted that if it is not a "reasonably anticipated use" to step on the back edge of the seat of a folding chair instead of the front (as in *Myers*), to reach under the hood of an automobile into an unseen area (as in *Daigle*), and to ride a precision bicycle knowing that it has a wobbly wheel while admitting lack of knowledge of how to mount it (as in *Delphen*), then the present situation, in which hundreds of thousands of pounds of oilfield pipe were allowed to continue to lean against gravity as well as common sense and industry practice, is certainly in accord. Any argument to the contrary is simply absurd.

Based upon the foregoing, the majority in the Fifth Circuit clearly analyzed the latest Louisiana state court jurisprudence and held in conformity therewith. In any event, however, such matters are nothing more than state law issues which have no overriding national or federal significance, and which should not thus warrant this Court's attention.

CONCLUSION

Petitioners' writ application to this Honorable Court presents a classic example of a quest for form over substance. Their endless citations of the *Erie* doctrine add no force to their position —reduced to essentials, petitioners hope to have this Court review state law issues under the guise of an "admission ticket" through which they assert the purely technical violation of a federal procedural rule.

The primary purpose of FRCP 50 is to prevent "ambush". Not only did petitioners never raise a Rule 50 problem prior to their writ application in this Court, their behavior and actions in the lower courts clearly indicate that no such problem ever existed—as a result, it appears that, in actuality, respondents are the ones who are is being "ambushed".

The petitioners' conduct goes far beyond merely remaining silent on these issues, although silence alone would constitute a waiver of their right to now protest. The transcript, and the events described herein, taken in context, clearly reveal that petitioners were at all times aware of the reasons underlying respondents' motions for judgment as a matter of law. In any event, however, petitioners have forfeited their right to now complain.

In the trial itself, petitioners asserted in their own motion for judgment as a matter of law that "reasonably anticipated use" had been firmly established in their favor and should thus not be within the province of the jury's verdict. Clearly, therefore, they felt that no further proof was needed.

After trial, respondents filed a written motion for judgment as a matter of law, again raising the issue of reasonably anticipated use and other issues. Petitioners submitted a written response to same and never raised a Rule 50 violation; instead,

they argued the merits of the motion and, as had been done during trial, the Court denied same.

In the Fifth Circuit, petitioners not only raised no Rule 50 problem, they admitted the contrary, *i.e.*, that respondent had made a motion for judgment as a matter of law at the close of their case, and again at the close of all the evidence, the underlying reasons for which were that the accident did not occur during a reasonably anticipated use and that the product was not otherwise unreasonably dangerous. Clearly, therefore, petitioners were at all times aware of the reasons underlying those motions.

In their appellate brief to the Fifth Circuit, petitioners asserted that the standard of appellate review in this matter should be that which is commonly referred to as "sufficiency of the evidence" — that standard had indeed been applied by the majority in the Fifth Circuit, utilizing case citations provided by petitioners. Thus, not only did petitioners not raise a Rule 50 problem, but further, they themselves urged the very standard of review which they now assert should be considered improper.

Even in this Court, petitioners have never stated or otherwise indicated that they were "ambushed". They have not requested a new trial, or even suggested that such would be needed to "cure any defects" in their proof — notably, the vast majority of proof on the issue of "reasonably anticipated use" came from their own witnesses.

Nothing further needs to be stated with respect to petitioners' arguments concerning Louisiana law, except to reiterate that such are merely state law issues which have no overriding federal or national significance. For all of the foregoing reasons, petitioners' writ application should be denied.

Respectfully submitted,

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APPENDIX A — RELEVANT RULES

FEDERAL RULES OF APPELLATE PROCEDURE 28(a)(3) and 28 (a)(6):

Rule 28. Briefs

(a) Appellant's Brief. — The brief of the appellant must contain, under appropriate headings and in the order here indicated:

* * *

(3) A statement of the issues presented for review.

* * *

(6) An argument. The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

* * *

FEDERAL RULE OF CIVIL PROCEDURE 50:

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

Appendix A

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment — and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate

court concludes that the trial erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995.)

SUPREME COURT RULE 10

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

APPENDIX B — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

[Commencing at page 528]

THAT, MR. ROYER, IS THE PLAINTIFF'S EVIDENCE COMPLETE?

MR. ROYER: YES, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. RANEY: YOUR HONOR, MAY WE HAVE A BRIEF CONFERENCE WITH YOU?

THE COURT: ALL RIGHT.

(DISCUSSION OFF THE RECORD)

THE COURT: LADIES AND GENTLEMEN, WE'RE GONNA TAKE A RECESS NOW. THERE MAY BE SOME THINGS THAT WE MIGHT BE ABLE TO WORK OUT TO SAVE SOME TIME THROUGHOUT THE PRESENTATION OF THE DEFENDANT'S EVIDENCE, SO WE'LL TAKE A RECESS AT THIS TIME.

(RECESS)

(JURY ABSENT)

THE COURT: THANK YOU, PLEASE BE SEATED. WHY DON'T WE GO AHEAD AND TAKE UP THIS EXHIBIT 23.1 BEFORE IT GETS FORGOTTEN? WHAT IS THE NATURE OF THE OBJECTION THE DEFENSE HAS TO THAT EXHIBIT?

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MR. RANEY: YOUR HONOR, IT'S DATED PAST THE TIME THAT THIS RACKING BOARD WAS MANUFACTURED, AT LEAST THE [529] FIRST PAGE OF IT IS THAT SHOWS THE MAIN FRAME AND SUBSTANCE OF THE RACKING BOARD.

THE COURT: MR. ROYER, DOES IT HAVE ANY RELEVANCE OTHER THAN AS TO THE ADEQUACY OF THE DESIGN?

MR. ROYER: YOUR HONOR, YES. OF COURSE, IT DEFINITELY WOULD RELATE TO THE ISSUE OF WARNINGS. THE REASON THAT DEFENSE COUNSEL I'M SURE IS STRENUOUSLY OBJECTING SO MUCH IS THAT THERE'S BEEN TESTIMONY THAT MR. KNOLL TOOK HIS DESIGN SOMEWHAT FROM THE IDECO RACKING BOARD AND THIS HAPPENS TO BE A BLUEPRINT OF AN IDECO RACKING BOARD, AND THE STEP PLATFORMS THAT WE SEE THERE IS SUBSTANTIALLY CLOSER TO THE DIVING BOARD AND WHEN YOU LOOK AT THE FINGERS THAT GO IN THIS RACKING BOARD THERE'S ONLY ABOUT SIX AND FIVE-EIGHTHS INCHES BETWEEN THE END OF THE FINGERS AND THE PLATFORM, ALTHOUGH IT DOESN'T SHOW IT ON FRONT PAGE. SO CLEARLY THEY'RE MUCH CONCERNED I WOULD THINK FOR THAT REASON ABOUT THIS BLUEPRINT GOING IN, BUT IT'S CLEARLY RELEVANT AND MATERIAL TO THIS MATTER IN WHETHER OR NOT THEY SHOULD HAVE — LET'S ASSUME THAT MAYBE THEY COULDN'T HAVE POSSIBLY KNOWN ABOUT THIS DESIGN PRIOR TO AUGUST OF 1981, BUT THEY COULD HAVE CERTAINLY KNOWN ABOUT IT AS OF AUGUST

1981 AND THEY COULD HAVE EASILY AT THAT POINT IN TIME TAKEN SOME MEASURES AS A RESPONSIBLE MANUFACTURER TO PROVIDE WARNINGS, INSTRUCTIONS, CAUTIONS OR RECALL OR SOMETHING TO MAKE THEIR RACKING BOARD SAFER FOR [530] THOSE IN THE INDUSTRY USING THAT RACKING BOARD, AND I WOULD NOTE THAT THE OTHER PARTS OF THE DIAGRAM — THIS IS OBVIOUSLY AN UPDATED VERSION OF SIMPLY ONE EARLIER, BUT THE PARTS OF IT, THE SECOND PAGE THAT GOES TO THIS DIAGRAM, OKAY, IS DATED FEBRUARY 26 OF 1980. SO I THINK IF YOU LOOK AT THE EVIDENCE — AND THE OTHER DRAWING IS DATED MAY 1 OF 1980, THEN THE OTHER ONE IS DATED APRIL 24 OF '80 — CLEARLY THERE'S A QUESTION OF FACT WITH RESPECT TO WHETHER THIS PARTICULAR DESIGN ANYWAY WAS AVAILABLE PRIOR TO THE TIME THAT OUR RIG WAS MANUFACTURED.

THE COURT: WELL, WHAT EVIDENCE DO YOU HAVE THAT WOULD SUPPORT THAT OTHER THAN THE DRAWINGS ATTACHED TO THE BACK? I MEAN, IS THERE SOME WITNESS WHO HAS OFFERED SOME TESTIMONY ABOUT THIS DRAWING?

MR. ROYER: YES, YOUR HONOR, MR. JACK REEVE WHOM THE DEFENDANTS ARE FIXING TO INTRODUCE IN ITS ENTIRETY HIS DEPOSITION IDENTIFIES AND DISCUSSES THIS BLUEPRINT, AND IN THE SUBPOENA WE ASKED FOR — TO MR. REEVE — ALL THE ALTERNATIVE DESIGNS THAT WERE AVAILABLE PRIOR TO THE MANUFACTURE OF THIS RIG AND HE'S THE ONE WHO PRODUCED THIS SET OF BLUEPRINTS.

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THE COURT: UNFORTUNATELY, THAT IS NOT IN EVIDENCE AT THIS TIME. I CAN'T RELY ON WHAT MAY COME IN THE FUTURE. BUT IS THERE ANY WARNING THAT THE PLAINTIFF IS ARGUING SHOULD HAVE BEEN ON THIS BESIDES A WARNING ABOUT [531] NOT TYING INTO THE BACK HANDRAIL? I'VE NOT HEARD ANYTHING OTHER THAN THAT.

MR. ROYER: WELL, YOUR HONOR, YOU HEARD DR. SHELTON STATE HE HAD THREE CRITICISMS OF THIS RACKING BOARD AND ONE OF THE THREE CRITICISMS THAT HE HAD OF THIS RACKING BOARD WAS THE EXCESSIVE SPACE BETWEEN THE END OF THE FINGERS AND THOSE WALKWAYS, SO —

THE COURT: DOES THAT HAVE ANYTHING TO DO WITH THE ACCIDENT?

MR. ROYER: WELL, YOUR HONOR, IT DOES IN THE FACT THAT IF THE PIPE IS TRAPPED BACK WITHIN THAT RACKING BOARD, THAT DERRICKMAN — ASSUMING THAT HANDRAIL GIVES, IT'S ONLY GOING TO FALL A SHORT DISTANCE, OKAY, AND BE TRAPPED WITHIN THAT RACKING BOARD AND IS NOT GOING TO SWARM AS OCCURRED IN THIS CASE, AND THE DERRICKMAN IS NOT GOING TO FALL COMPLETELY OUT OF THE RACKING BOARD INTO THE MAST AND BE CRUSHED BY THE PIPE.

THE COURT: I DON'T RECALL ANY WITNESS TESTIFYING THAT THE ACCIDENT COULD HAVE BEEN AVOIDED BY HAVING THAT PLATFORM CLOSER TO THE END OF THE FINGERS. ARE YOU REPRESENTING THAT THE WITNESSES HAVE SO TESTIFIED?

MR. ROYER: NO, YOUR HONOR, I'M NOT SAYING ANYBODY HAS DIRECTLY STATED THAT, NO, I AM NOT REPRESENTING THAT TO THE COURT AT ALL, NO.

THE COURT: WELL, I THINK THAT ON THE ISSUE OF [532] DESIGN IT'S CLEAR THAT THE EVIDENCE NEEDS TO HAVE EXISTED BEFORE THE SUBJECT PRODUCT WAS MANUFACTURED.

MR. ROYER: YOUR HONOR, WHY DON'T WE JUST WITHDRAW THE INTRODUCTION OF THIS EXHIBIT AT THIS POINT IN TIME AND SEE SHOULD IT NEED TO BE PRESENTED AT SOME LATER POINT IN TIME, AND THAT WILL SAVE THE COURT —

THE COURT: ALL RIGHT, THAT'S FINE.

MR. ROYER: — FROM HAVING TO RULE AND WE WILL —

THE COURT: I'LL CONSIDER IT WITHDRAWN.

MR. ROYER: THANK YOU.

THE COURT: YOU HAD MADE REFERENCE, MR. RANEY, TO SOME MOTION, I BELIEVE, THAT YOU WANTED TO MAKE AT THE NEXT RECESS. THIS IS THE NEXT RECESS.

MR. RANEY: YES, SIR, WE WOULD MOVE TO DISMISS AT THIS TIME ON A DIRECTED VERDICT, YOUR HONOR.

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THE COURT: ALL RIGHT, I'LL CONSIDER THAT MOTION AS HAVING BEEN MADE AND DENIED, AND WE WILL BE IN RECESS FOR THE NEXT 20 MINUTES TO ALLOW YOU TO PREPARE FOR YOUR CASE IN CHIEF.

MR. RANEY: THANK YOU.

(RECESS)

(JURY ABSENT)

* * *

[765] JUST HAVEN'T GOTTEN TO THAT POINT SO FAR, BUT THE PLAINTIFFS . . . PLAINTIFF'S PROPOSED JURY INSTRUCTION, YOUR HONOR — I TAKE BACK THAT NUMBER. WE'LL MAKE IT 40, NO. 40. SINCE I'VE GOT 4, I'LL JUST PUT A ZERO ON IT, OR YOU WANT ME TO MAKE IT SOME OTHER NUMBER CLOSER?

THE COURT: IT DOESN'T MATTER TO ME.

MR. ROYER: OKAY, PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 40, AND IT'S A DISCUSSION OF THE LAW AS WELL, BUT BASICALLY IT IS OUR POSITION THAT IF THE JURY IS, THIS INSTRUCTION IS GOING TO BE SUBMITTED TO THE JURY, FIRST AND FOREMOST WE BELIEVE THAT IT'S A MATTER OF LAW FOR YOUR HONOR THAT THERE ARE NO FACTS OVER WHICH REASONABLE MINDS COULD DIFFER THAT THEY WERE INVOLVED IN A REASONABLY ANTICIPATED USE OF THIS PRODUCT AT THE TIME THAT MR. HUNTER WAS KILLED; THEREFORE, IT IS

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OUR POSITION THAT THE REASONABLY ANTICIPATED USE ISSUE SHOULD NOT BE TENDERED TO THE JURY, AND I'LL CITE TO YOUR HONOR — DEFENDANTS HAD CITED LOCKART VERSUS KOLB STEEL CONSTRUCTION LIMITED, MACHINERY DIVISION, AND THEY REFERRED TO AN ARTICLE BY JOHN KENNEDY, A DRAFTER OF THE LOUISIANA PRODUCT'S LIABILITY ACT. THAT CASE IS NOT AT ALL SIMILAR TO THIS CASE, ENTIRELY DIFFERENT. CLEARLY MR. HUNTER WAS USING THIS RACKING BOARD TO RACK PIPE; THAT'S ITS INTENDED USE, AND THE FACT THAT SOME OF THAT PIPE WAS LEANING TOWARD THE MAST HAS CERTAINLY GOT TO BE

* * *

[857] A. (WITNESS COMPLIES).

Q. THANK YOU, SIR. MR. PRINCE, CAN YOU TELL ME HOW OFTEN WHEN YOU'RE RACKING THREE AND A HALF INCH E.U.E. N-80 TUBING THAT WEIGHS 12.95 POUNDS PER FOOT THAT IT'S GOING TO BE GETTING TO THE POINT THAT IT STARTS LEANING BACK TOWARDS THE MAST?

A. ALMOST EVERY TIME.

MR. RANEY: YOUR HONOR, I HAVE TO OBJECT AGAIN. THIS IS SOMETHING THAT COULD HAVE BEEN DONE — IT IS NOT REBUTTAL.

THE COURT: WELL, I DON'T —

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MR. ROYER: YOUR HONOR, THE DEFENDANTS HAVE BEEN — THAT'S ALL THEIR CASE HAS BEEN ON DEFENSE, HAS BEEN THE LEAN OF THE PIPE.

THE COURT: I DON'T WANT TO GO BACK THROUGH THIS WITNESS' AND ALL THE OTHER WITNESSES' TESTIMONY AT THIS POINT. IF THERE'S SOMETHING THAT CAME UP FOR THE FIRST TIME ON THEIR CASE IN CHIEF THAT WASN'T EXPLORED BY YOU WHEN THIS WITNESS TESTIFIED PREVIOUSLY, THEN WE CAN GO INTO THAT, BUT I'LL SUSTAIN THE OBJECTION AS TO THIS QUESTION.

MR. ROYER: I DON'T THINK WE ADDRESSED THIS PARTICULAR QUESTION WITH HIM THE FIRST TIME, THOUGH, YOUR HONOR.

THE COURT: WELL, IF THIS SUBJECT MATTER WAS

* * *

[891] CLOSING ARGUMENTS. WE'RE GOING TO NEED TO ASK YOU TO WAIT WHILE WE FINALIZE EVERYTHING NOW IN THE JURY ROOM, BUT IT WON'T BE MUCH LONGER UNTIL WE CAN HAVE YOU BACK IN HERE FOR THAT. AT THIS TIME WE'LL EXCUSE THE JURY.

(JURY EXITS)

THE COURT: THANK YOU, PLEASE BE SEATED.

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MR. RANEY: YOUR HONOR, JUST A COUPLE OF MATTERS BRIEFLY, IF I MAY.

THE COURT: YES.

MR. RANEY: FIRST OF ALL, SINCE YOU ALLOWED ARGUMENT ON MR. PERRAULT'S TESTIMONY, I PRESUME THAT THAT WAS REGISTERED AS AN OBJECTION BY ME IN THE RECORD?

THE COURT: I CONSIDERED IT AS SUCH.

MR. RANEY: THANK YOU. AND WE WOULD RE-URGE OUR MOTION AT THIS TIME FOR DISMISSAL.

THE COURT: THE MOTION FOR JUDGMENT AS A MATTER OF LAW WILL BE NOTED AND DENIED AT THIS TIME.

MR. POSEY: YOUR HONOR, WE WOULD ALSO LIKE TO MOVE FOR A JUDGMENT AS A MATTER OF LAW AS TO THE COMPARATIVE FAULT OF CLAUDE HUNTER FOR THE REASONS EARLIER STATED BY MR. ROYER, AND I WON'T GO OVER THOSE AGAIN AT THIS TIME. AND, ALSO, AS TO THE ISSUE OF REASONABLY ANTICIPATED USE, IT'S OUR CONTENTION STILL THAT THAT IS [892] NOT WITHIN WHAT IS CONTEMPLATED BY THE LAW. THE FACTS OF THIS CASE CLEARLY CONSTITUTE A REASONABLY ANTICIPATED USE OF THIS PRODUCT AND, THEREFORE, THAT PARTICULAR INSTRUCTION SHOULD GO TO THE JURY.

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THE COURT: I UNDERSTAND BOTH OF THOSE ARGUMENTS AND THEY ARE NOTED. HOWEVER, THE MOTION WILL BE DENIED IN THOSE RESPECTS AS WELL. AS SOON AS WE HAVE COMPLETED THE JURY INSTRUCTIONS, WHICH SHOULD ONLY TAKE A FEW MORE MINUTES, WE'LL BE PREPARED TO GIVE THOSE TO THE JURY AND IMMEDIATELY AFTER THAT WE'LL GO INTO THE CLOSING ARGUMENTS. HOW MUCH TIME WOULD YOU REQUEST FOR THAT, MR. ROYER?

MR. ROYER: YOUR HONOR, WE WOULD REQUEST 30 MINUTES AND WE WOULD REQUEST THAT MR. POSEY BE ALLOWED TO PRESENT THE INITIAL CLOSING ARGUMENT 20 MINUTES AND RESERVE 10 MINUTES AND I WILL TAKE THE REBUTTAL.

THE COURT: ALL RIGHT. AND, MR. RANEY, YOU'LL BE ALLOWED 30 MINUTES AS WELL. DO YOU HAVE ANY OBJECTION TO THAT? —

MR. RANEY: I THINK I CAN DO IT IN THAT TIME, YOUR HONOR.

THE COURT: ALL RIGHT. MR. POSEY, DO YOU WANT TO HAVE ANY INDICATION FROM ME AT SOME POINT BEFORE THE END OF THE 20 MINUTES?

MR. POSEY: YES, PLEASE, IF YOU COULD LET ME

* * *

Supreme Court, U.S.
FILED
SEP 23 1996
CLERK

NO. 96-12

In the Supreme Court of the United States

OCTOBER TERM, 1995

Ilene Thurman Hunter, on behalf of Kathy Michelle Hunter, Claude Kenneth Hunter, Jr., Michael Christopher Hunter, Melissa Ilene Hunter, and Donovan Blaine Hunter,

Petitioners,

v.

Knoll Rig and Equipment Manufacturing Company, Ltd., (a Subsidiary of Dreco Group of Companies, Ltd.) and National Union Fire Insurance Company of Pittsburgh, PA.

Respondents,

v.

Fidelity and Casualty Company of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The Petitioners read the Brief of the Respondents as raising issues that accentuate the conflict between the Circuit Courts on whether to liberally or strictly construe and apply Fed.R.Civ.P. 50(a) (2) when reviewing the trial court's denial of a jury verdict loser's motion for judgment as a matter of law. This conflict in the interpretation and application of Rule 50(a) (2) by the Courts result in different degrees of protection to be afforded by, and violations of, the Seventh Amendment of the U.S. Constitution. These issues will be discussed as the Petitioners respond to arguments raised by KREMCO.

1. The Respondents contend this Court has no jurisdiction over the Fed.R.Civ.P. 50(a) (2) and Seventh Amendment Issues.

KREMCO failed to set forth the appropriate standard of review and any specific motion that preserved any legal issue for review by the appellate court. Fed.R.Civ.P. 50 was never discussed. KREMCO cited *Myers v. American Seating Co.*, 637 So.2d 771 (LA. App. 1 Cir.1994), discussed infra. The Hunters thought KREMCO was arguing for the application of the Louisiana procedure that allows appellate review of the facts. It was in response to the citation of *Myers* that the Hunters argued the proper standard for reviewing the jury verdict was stated in *Prestenbach v. Rains*, 4 F.3d 358, 361 (5th Cir.1993). This argument does not waive the Hunters' right to contest, nor does it give the appellate court the right to abdicate its duty to determine, whether specific legal questions were preserved under Rule 50 to empower the appellate court to review the sufficiency of the evidence. *Umpleby v. Potter & Brumfield, Inc.*, 69 F.3d 209 (7th Cir.1995) and *Sector Refining, Inc. v. Enterprise Refining Co.*, 771 F.2d 496 (T.E.C.A. 1985 at pages 504-505).

An erroneous statement by the Hunters, *after* the majority decision, in the Suggestion for Rehearing En Banc[1]

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[1] The erroneous statement is explained in Appendix RB, at RA-3 to RA-20.

does not legitimize the unconstitutional decision. The Suggestion asserted:

> *ISSUE #2:* The Hunters contend this Court has made findings of fact in reaching conclusions and making inferences from the conflicting evidence that are at odds with the jury verdict, with the province of the jury to decide this case, and with the Hunters' right to a trial by jury as guaranteed by the 7th Amendment of the U.S. Constitution. Is this decision inconsistant with *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir.1969) (en banc) and the 7th Amendment of the U.S. Constitution?

On March 28, 1996, the Suggestion was denied.

On May 20, 1996, the Hunters filed a "Notice of Intent to Move to Void Judgment Granted Under F.R.C.P. 50 for Lack of Jurisdiction" (Appendix RC, RA-21).

The Hunters prepared twenty (20) copies of an Original Brief (Apendix RB, RA-3 to 20) and an Appendix (223 pages) on Suggestion for Hearing En Banc on Motion to Recall Mandate and Void Judgment Granted Under Fed.R.Civ.P. 50 for Lack of Jurisdiction that were received by the Fifth Circuit on June 3,1996. On June 5, 1996, the Hunters were informed by a Deputy Clerk (Appendix RA, RA-1):

> Appellants' Notice of Intent to Move to Void Judgment, etc., was received on May 20, 1996; appellants' Brief and Appendix on Suggestion for Hearing En Banc on Motion to Recall Mandate and Void Judgment, etc. were received on June 3, 1996.
>
> Confirming our telephone conversation of this date, and at the direction of the Court, these documents are being returned unfiled with the advice that the Court has already ruled and no further action will be taken in this case.[2]

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[2] The "FILED" stamp dated 5/20/96 on the Notice of Intent to Void Judgment, etc., was altered to read "REC'ED". The Deputy Clerk said she could not tell counsel for the Hunters which judge(s) directed the pleadings to be returned "unfiled". Counsel of record suspects the pleadings were reviewed only by the judge who wrote the opinion. On June 11, 1996, Justice Barksdale authored another opinion against a very strong dissent that reversed a judgment based on a jury verdict in favor of a Louisiana product liability claimant, and rendered judgment as a matter of law to

The lower court must have reviewed the record to resolve the issue of whether there was a Rule 50(a) motion at the close of all the evidence to have the *power* to review the sufficiency of the evidence. *McArthur v. University of Tex. Health Center Tyler,* 45 F.3d 890 (5th Cir.1995); *McCann v. Texas City Refining, Inc.,* 984 F.2d 667, 671 (5th Cir.1993). Respondents even admit by their argument at pages 8 to 9 of their Brief that the Rule 50(a) issue must have been reviewed and resolved in their favor by the Fifth Circuit.

This Court has the jurisdiction to decide the Rule 50 and Seventh Amendment issues which have been raised or resolved in the lower court. *Youakim v. Miller,* 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976).

2. The Respondents contend that following the "liberal view" of Fed.R.Civ.P. 50, they either complied, or the lower court excused or waived the Respondents' non-compliance, with Fed.R.Civ.P. 50(a).

KREMCO did not state any reasons "off the record, during a recess" why the Motion to Dismiss made at the close of the Hunters' case should be granted. There was a discussion off the record, but this was not during a recess. Counsel recalls approaching the Bench with counsel for KREMCO who advised Magistrate Payne that KREMCO wanted to present a motion outside the presence of the jury. Magistrate Payne immediately proceeded to recess: "Ladies and Gentlemen, we're gonna take a recess now. There may be some things that we might be able to work out to save some time throughout the presentation of the Defendant's evidence, so we'll take a recess at this time." During the recess, Magistrate Payne stated: "You had made reference, Mr. Raney, to some motion, I believe, that you wanted to make at the next recess. This is the next recess." Counsel for KREMCO responded: **"Yes, Sir, we would move to dismiss at this time on a directed verdict, Your Honor."**

---

footnote 2 continued

the product manufacturer. *Guilbeau v. W.W. Henry Co.,* 85 F.3d 1149 (5th Cir.1996). This decision confirms a liberal interpretation and application of Rule 50 in favor of verdict losers.

After this motion was denied, KREMCO presented the testimony of eight (8) witnesses over a period of two (2) days. The Hunters called five (5) rebuttal witnesses. Following the close of all the evidence, KREMCO stated: **"And we would re-urge our motion at this time of dismissal."**

In this case, the "liberal view" of what constitutes a specific motion under Rule 50(a) (2) has allowed the Court of Appeals to re-examine facts tried by a jury in violation of the Seventh Amendment. *Gasperini v. Center for Humanities, Inc.*, 116 S.Ct. 2211 (1996). By granting the writ application, this Court can correct this injustice, and resolve the conflict with the Seventh Circuit which follows the plain language of, and rigidly applies, Rule 50. *Downes v. Volkswagen of America, Inc.*, 41 F.3d 1132 (7th Cir.1994) at page 1139, and *Umpleby*, supra.

3. The Respondents contend that following the "liberal view" of Fed.R.Civ.P. 50(b), they should be allowed to add specifications that were not included in the Rule 50(a) (2) motion, and the Hunters' failure to object in the trial court to this deficient motion waives their right to object before the Appellate Court and this Court.

Following judgment for the Hunters, KREMCO filed a "Motion for Judgment as a Matter of Law" requesting the jury verdict to be "set aside", and "exonerated" (Appendix RD, RA-24). This motion, including the memorandum (Appendix RE, RA-27), does not allege that it is renewing any previous motion. Only by a very liberal interpretation and application of Rule 50(b) could the Fifth Circuit find compliance. But as this Court held in *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 73 S.Ct. 125 (1952), a verdict loser's motion to "set aside" the jury's verdict did not comply with Rule 50(b)'s requirement of a timely motion for judgment *n.o.v.* And as this Court stated in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S.Ct. 1072 (1967), at 1078, after discussing *Cone v. West Virginia Pulp and Paper Co.*, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947), *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 68 S.Ct. 246, 92 L.Ed. 177 (1948), *Johnson*, supra, and *Weade v. Dichmann, Wright, and Pugh*,

Inc., 337 U.S. 801, 69 S.Ct. 1326, 93 L.Ed. 1704 (1949): "**The opinions in the above cases make it clear that an appellate court may not order judgment *n.o.v.* where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b)...**" (Emphasis added.) Again, there is a conflict between the Circuits on whether to liberally or strictly construe and apply Rule 50(b) in concert with Rule 50(a) (2) that could be resolved by this Court. *McArthur* and *Umpleby,* supra.

Also, KREMCO argues that the right to a jury trial was "waived" because the Hunters failed to timely object to its deficient Rule 50(b) motion. KREMCO contends this case stands in the same posture as *Whelan v. Abell,* 48 F.3d 1247 (D.C. Cir.1995); the only difference being that the trial court granted the Rule 50(b) motion. The jurisprudence demonstrates there is a substantial difference between the trial court granting and denying a motion for judgment as a matter of law that does not comply with the specificity requirements of Rule 50(a). 9A Wright & Miller, *Federal Practice & Procedure: Civil 2d,* §2533, page 314 (1994):

> The important point is that the trial court cannot err in passing on a motion for judgment as a matter of law that does not state the grounds sufficiently. If it denies the motion, the moving party may not complain about the denial on appeal. Conversely if it grants the motion, an adverse party who did not object to the lack of grounds in the trail court may not raise this point in the appellate court.

The result in *Whelan* is consistent with prior jurisprudence. However, the "waiver" reasoning would be in conflict with other circuit courts if it would be applied to allow a "waiver" of the right to a jury trial to be raised in the appellate court after the trial court *denied* the motion. The apparent conflict presented by *Whelan* is another reason to grant the writ.

4.The Respondents contend the Hunters were not "ambushed".

The Hunters were "ambushed". The flawed legal argu-

ment of KREMCO that persuaded the majority panel to decide the "threshold issue"[3] in a product liability case is whether the product is being subjected to a reasonably anticipated use was first presented after the jury verdict. The jury interrogatories (Appendix F, A-34 to A-37) show the jury was instructed to determine the "threshold issue": "Do you find by a preponderance of the evidence that, at the time the racking board of the workover rig left KREMCO's control, it was unreasonably dangerous in design, or because of an inadequate warning or breach of an express warranty?" Only if the jury answered YES would the jury answer the second interrogatory: "Do you find by a preponderance of the evidence that Mr. Hunter's death was caused by an unreasonably dangerous characteristic of the racking board during a reasonably anticipated use of that product?" The Hunters contend by not analyzing the unreasonably dangerous characteristics of the product first, the Court could not appreciate what should be the reasonably anticipated uses to be expected by the manufacturer.

And if needed, there was additional evidence that the Hunters could have introduced at the close of the evidence.[4] KREMCO's defense strategy at that time was to win a jury verdict. Therefore, the sufficiency of the evidence was not reviewable on appeal. See 9A Wright & Miller, *Federal Practice and Procedure: Civil 2d* §2536, at 329-331 (1994).

---

[3] KREMCO argues the "reasonably anticipated use" of the product is a "threshold *element*", apparently retreating from its earlier argument to the Fifth Circuit that it is the "threshold *issue*". The Hunters agree the reasonably anticipated use is an element that must be proven, but the utility of the product must be analyzed in relationship to the unreasonably dangerous charcteristics, such as the alternative designs that were capable of preventing Hunter's death. LA.R.S. 9:2800.56.

[4] J. Robert Kubelka, a drilling rig equipment and safety consultant, who worked his way up through the oifield, including several years as a derrickman, was present during the entire trial. The case developed so well he was not called as a witness during the presentation of the case, or in rebuttal. Also, there were several depositions of out of state witnesses, and videotapes of pipe racking operations that had been approved by magistrate Payne, that could have been introduced.

5. The Respondents contend the Hunters waived their right to a jury trial by moving for a judgment as a matter of law on the "reasonably anticipated use" issue.

This argument is contrary to the official comment for the 1991 Amendment, Subdivision (a): "Thus, it should not be necessary to state in the test of this Rule that a motion made pursuant to it is not a waiver of the right to jury trial, and only the antiquities of directed verdict practice suggest that it might have been." The Hunters have not waived their right to a jury trial by moving for a judgment as a matter of law on their own behalf.

6. The Respondents contend that *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) is inapplicable to this case.

The Fifth Circuit did not follow *Anderson* (1) by applying the correct substantive evidentiary standard of proof that was applied at the trial on the merits, (2) by leaving credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts, to the jury, and (3) by believing the evidence of the non-movant, and all justifiable inferences to be drawn in his favor. The jury instruction on reasonably anticipated use was: "In addition to the burden of proving that the product possessesd an unreasonably dangerous characteristic, the Plaintiffs must prove that the damage arose from a reasonably anticipated use of the product. *In other words, the way Mr. Hunter was using the product must have been something the manufacturer should expect might happen during the life of the product.*" (Emphasis added, TTR. 903.) This standard was not followed when reasonably anticipated use was analyzed to be equivalent to the common use of the product.

The Circuit Courts are divided on the proper standard to be applied in reviewing the sufficiency of the evidence. See 9A Wright & Miller, *Federal Practice & Procedure: Civil 2d*, §2529 (1994). By granting this writ, this Court could resolve the conflict.

7. The Respondents contend *Myers v. American Seating Co.*, 637 So.2d 771 (LA. App. 1 Cir.1994) supports the

Fifth Circuit decision in this case.

Myers supports the Hunters! Myers had stepped onto the rear of a folding chair which folded causing her foot and leg to slip through the opening and suffer a personal injury. In a jury case, the trial judge granted a directed verdict. The First Circuit reversed the directed verdict holding that reasonable people could have reached a different conclusion.

KREMCO's erroneous interpretation of *Myers* is the foundation for the decision of the majority panel. *Myers* states at 778:

> After reviewing the entire record, we conclude that, based on the evidence presented to the jury, reasonable people could have reached a different conclusion. Therefore, the trial court erred in granting American Seating's motion for directed verdict. However, our inquiry does not end here.
>
> Instead of remanding this matter to the trial court, we will decide de novo the liability of American Seating under the LPLA.[5]

Myers contradicts the decision of the Fifth Circuit in two ways: (1) The threshold issue to be determined in a product liability case is whether the product is unreasonably dangerous; and (2) Whether the product is being subjected to a reasonably anticipated use is a broad factual question.

8. The Respondents contend "hundreds of thousands of pounds of oilfield pipe were allowed to continue to lean against gravity as well as common sense and industry practice," and "each and everyone of Mr. Hunter's co-employees testified that the "use" of KREMCO's product on the day of the accident was known by the crew, including Mr. Hunter, to be dangerous, unnecessary, and against industry practice."

There were 143 stands of 3½ inch EUE N-80 tub-

---

[5] Although the Fifth Circuit should have used a de novo standard of review, *Downes*, supra, it does not have the authority to apply the Louisiana appellate de novo standard of review. *Gasperini*, supra.

ing that varied between 55 to 65 feet in length and weighed 12.95 pounds per foot, a total weight of approximately 110,000 pounds. There were six rows (5 fingers) on each side of the racking board in which 12 stands of pipe had been racked vertically in a row, except that one of the rows would have had only eleven (11) stands. According to the testimony of Thomas Shelton, Ph.D., a mechanical and metallurgical engineer, the top of the last stand of pipe that was racked in the 12th row was leaning 11 inches from vertical toward the mast. The static weight of each row of 12 stands of pipe would approach up to 45 or 46 pounds; the total static weight of all 12 rows leaning toward the mast, and pulling against the rear handrail would have been less than 552 pounds. The weakest latch assembly would not commence plastic deformation (failure) until it was loaded in excess of 800 pounds. The pipe, tied in a line with the rope to the rear handrail, would be subject to movement from the vibration or shaking of the mast that would produce significant dynamic loading or pulling against the rear handrail. This dynamic loading caused the failure of the latch assembly and allowed the pipe to swarm.

Dr. Shelton demonstrated by diagrams that by using slotted fingers and three (3) chains to secure the tubing in the racking board,[6] the same pipe as racked that evening, which had developed an 11 inch lean toward the mast using rope to secure it in the racking board, could have been racked without developing any negative lean toward the mast. Rope is not an efficient method for securing pipe to prevent the development of lean toward the mast or the swarming of pipe. The reasonably anticipated use of rope to secure pipe in racking boards is well stated in a patent application filed August 7, 1979, entitled *"Working Board for Drilling Rig"*, U.S. Patent #4,335,792, under the Description of the Prior Art (P-24.1, pg. 5):

> When pipe stands were being stored or removed from the finger racks the workman had no mechanical

[6] An Alternative design that was manufactured by Wilson Manufacturing Company prior to the manufacture of this racking board by KREMCO in 1981.

means to aid him and the work was hard, physical and inherently unsafe. The pipe had to be tied by a rope to remain in the finger racks and a rope was not always effective.

Claude Hunter had worked 13½ hours. He was racking pipe using rope as he was instructed by his supervisor, Charles Berry, when he was killed by swarming pipe.

The facts do not support KREMCO's irresponsible and reckless statements, nor the opinion of the Fifth Circuit which violates the Hunters' Seventh Amendment right to a trial by jury.

CONCLUSION

This Court has the jurisdiction to grant a writ to review the Rule 50 and Seventh Amendment issues. By granting this writ application, this Court could resolve the conflict between the Circuit Courts on whether to liberally or strictly construe and apply Fed.R.Civ.P. 50 (a) (2) in determining (1) whether an Appellate Court has the *power* to review the sufficiency of the evidence, and (2) what is the proper standard to be followed by an Appellate Court in reviewing the sufficiency of the evidence.

Accordingly, Petitioners pray that a writ issue to review the decision of the Fifth Circuit granting judgment to KREMCO under Fed.R.Civ.P. 50, the judgment be vacated or reversed, and the case be remanded for consideration of the other issues raised in the appeal.

Respectfully submitted,

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APPENDIX RA

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL: 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

June 5, 1996

Mr. R. Layne Royer
Attorney at Law
P. O. Box 14879
Baton Rouge, Louisiana 70898

In re: No.94-40822 - Hunter v. Knoll Rig

Dear Mr. Royer:

Appellants' Notice of Intent to Move to Void Judgment, etc., was received on May 20, 1996; appellants' Brief and Appendix on Suggestion for Hearing En Banc on Motion to Recall Mandate and Void Judgment, etc. were received on June 3, 1996.

Confirming our telephone conversation of this date, and at the direction of the Court, these documents are being returned unfiled with the advice that the Court has already ruled and no further action will be taken in this case.

Very Truly yours,

CHARLES R. FULBRUGE III, Clerk

BY: s/s Joan Perkins

Joan Perkins
Deputy Clerk

jp

cc: Mr. Ronald E. Raney
Mr. S. Price Barker

APPENDIX RB

ORIGINAL BRIEF ON SUGGESTION FOR HEARING EN BANC ON MOTION TO RECALL MANDATE AND VOID JUDGMENT GRANTED UNDER FED.R.CIV.P. 50 FOR LACK OF POWER ON BEHALF OF PLAINTIFFS-APPELLANTS CROSS-APPELLEES ILENE THURMAN HUNTER, ET AL

STATEMENT OF THE ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION

As a predicate to granting KREMCO a Judgment as a Matter of Law under Fed.R.Civ.P. 50, a majority panel of this Court stated:

> Post-verdict, ***
> As it had at the close of the Hunters' case and of all the evidence, KREMCO moved for judgment as a matter of law on, *inter alia*, whether the accident occurred, as required by LPLA, during a "reasonably anticipated use" of the racking board.

About May 17, 1996, the Hunters discovered there were no facts of record that supported the statement that KREMCO moved, at the close of the Hunters' case and of all the evidence, for judgment as a matter of law on whether the accident occurred during a "reasonably anticipated use" of the racking board. The Hunters contend KREMCO waived its right to challenge the sufficiency of the evidence on appeal, and this Court had no power to grant a judgment under FED.R.Civ.P. 50, because KREMCO did not specify

why it was entitled to judgment as a matter of law before submission of the case to the jury.

Issue #1: Does this Court have the general jurisdiction to review the mandate to determine whether it should be recalled and voided for lack of power to grant KREMCO a judgment as a matter of law under Fed.R.Civ.P. 50, and/or to prevent injustice?

Issue #2: Should this Court exercise its general jurisdiction to recall and void the mandate for lack of power to grant KREMCO a judgment as a matter of law under Fed.R.Civ.P. 50, and/or to prevent injustice?

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

The course of the proceedings and the disposition of the case will be included under the Statement of the Facts Necessary to the Argument of the Issues.

STATEMENT OF THE FACTS NECESSARY TO THE ARGUMENT OF THE ISSUES

This case is a wrongful death products liability action brought by the surviving spouse and children of Claude Hunter, Sr., against Knoll Rig & Equipment Manufacturing Company, Ltd., A Subsidiary of Draco Group of Companies, Ltd. (KREMCO), the manufacturer of a "drilling rig", and its insurer, National Union Fire Insurance Co. of Pittsburgh, PA. The suit was filed in Louisiana State Court, but removed by KREMCO to U.S. District Court on the basis of diversity jurisdiction. The survivors allege that Hunter was

a derrickman working for Mosley Well Service, when during the evening of August 29, 1990, while racking pipe up in the racking board of the KREMCO mobile rig, approximately 143 stands of pipe weighing 110,000 pounds swarmed out of the racking board, killing Hunter as it crushed him in the mast of the mobile rig. The survivors further allege that Hunter's death was proximately caused by three unreasonably dangerous characteristics of the racking board manufactured by KREMCO: (1) defective design; (2) lack of warnings and instructions; and (3) breach of an express warranty.

Prior to trial, the total of the damages suffered by the Hunters was stipulated to be the sum of ONE MILLION THREE HUNDRED EIGHTY FOUR THOUSAND ONE HUNDRED EIGHTY SEVEN AND NO/100 ($1,384,187.00) DOLLARS.

On Monday, May 2, 1994, the case proceeded to trial on the issue of liability. The Hunters rested during the morning of Thursday, May 5, 1994. (TTR.528; App.L). Following an argument over the admission of design drawings for an alternative racking board (TTR.528-532; App.L and M), KREMCO presented a Motion to Dismiss:

> "The Court: You had made reference, Mr. Raney, to some motion, I believe, that you wanted to make at the next recess. This is the next recess.
>
> Mr. Raney: Yes, sir, we would move to dismiss at this time on a directed verdict, Your Honor.
>
> The Court: All right, I'll consider that motion

> as having been made and denied, and we will be in recess for the next 20 minutes to allow you to prepare for your case in chief."
> (TTR.532, lines 11-19; App.M)

KREMCO stated no basis whatsoever for its motion to dismiss on a directed verdict.

KREMCO presented defense testimony during the rest of the day and at the end of the day on May 5, 1994, the Court delivered to the parties a draft of the Jury Instructions and scheduled a jury charge conference for the next morning at 8:30 A.M.

During the jury charge conference on May 6, 1994 (TTR.759-785; App.N), the Hunters objected to the issues of Mr. Hunter's fault and reasonably anticipated use going to the jury, and claimed they were entitled to judgment as a matter of law on these issues (TTR.761-768; App.N). Further, if the issue of reasonably anticipated use was to be submitted to the jury, then the Hunters requested an instruction on a list of three product uses cited by Mr. John Kennedy in *A Primer on the Louisiana Products Liability Act*, 49 La.L.Rev. 565, 581-582 (1989), as examples that are not reasonably anticipated product uses (TTR.765-768; App.N):

1) using a soft drink bottle as a hammer;
2) attempting to drive an automobile across water; and
3) putting perfume on a candle to scent it.

KREMCO noted several objections to the *wording* on some of the Jury Instructions and the Jury Verdict Form, including

reasonably anticipated use, and some objections were noted for the failure to include requested jury instructions on other issues. However, KREMCO never objected to submitting the issue of reasonably anticipated use to the jury (TTR.768-777; App.N). KREMCO's specific objection to the *wording* on the issue of reasonably anticipated use of the racking board was:

> "Mr. Raney: Yes, Sir, top of page 9, at the very top, continuing on from the 1st page, it says in other words, the way Mr. Hunter was using the product must have been something the manufacturer should expect might happen during the life of the product, and it would appear to me that that relies too much on mere foreseeability instead of reasonably anticipated use, and my suggested language for that would be must have been something the manufacturer should have expected during the life of the product.
>
> The Court: You're asking that the language should expect might happen be changed to should have expected?
>
> Mr. Raney: Yes, Sir, should have expected during the life of the product, and leave out might happen and change it accordingly to should have expected during the life of the product."
>
> (TTR.771, line 14 - TTR.772, line 5; App.N)

KREMCO's objection to the Jury Verdict Form (App.K; TTR.907-909, App.R) on the issue of reasonably anticipated use was as follows:

> "Mr. Raney: In No. 2 on the Jury Verdict Form it would be my suggestion that the language beginning in the middle of that sentence, quote, by an unreasonably

dangerous characteristic of the racking board simply be deleted, so that it should read do you find by a preponderance of the evidence that Mr. Hunter's death was caused during a reasonably anticipated use of that product, because No. 1 up above talks about the product being unreasonably dangerous in design because of a breach of a warning or express warranty.

The Court: No. 2 is designed to inject the issue of causation, which is not in No. 1.

Mr. Raney: All right, Sir.

(TTR.775, line 6-18; App.N)

Then, KREMCO objected to the Hunters' request for the list of unreasonable uses cited by Mr. Kennedy, and further requested that if the Hunters' requested list was to be submitted to the jury, then KREMCO requested that the Court include the examples from *Lockhart v. Kobe Steel Ltd. Const. Mach. Div.*, 989 F.2d 864(5th Cir.1993) and *Daigle v. Audi of America, Inc.*, 598 So.2d 1304, 1307 (La. App. 3d Cir.1992). Further, in presenting argument in opposition to the Hunters' request for a Judgment as a Matter of Law on the comparative negligence of Hunter, KREMCO argued as follows:

"***Our point is that Mr. Hunter is the one up there, as we heard from the testimony from the witness stand, who kept racking the pipe without calling down to anyone else, **and that certainly makes it a jury issue.**" (emphasis added)

(TTR.779, lines 12-15; App.N)

At the close of all the evidence, oral motions were presented:

'Mr. Raney: Thank you. And we would re-urge our motion at this time for dismissal.

The Court: The Motion for Judgment as a Matter of Law will be noted and denied at this time.

Mr. Posey: Your Honor, we would also like to move for a Judgement as a Matter of Law as to the comparative fault of Claude Hunter for the reasons earlier stated by Mr. Royer, and I won't go over those again at this time. And, also, as to the issue of reasonably anticipated use, it's our contention still that that is not within what is contemplated by the Law. The facts of this case clearly constitute a reasonably anticipated use of this product, and, therefore, that particular instruction should go to the jury.

The Court: I understand both of those arguments and they are noted. However, the Motion will be denied in those respects as well."

(TTR.891, line 16 - TTR.892, line 7; App.Q)

Again, KREMCO cited *no reasons* whatsoever for its motion for dismissal (treated by the Court as a Motion for Judgment as a Matter of Law).

The Court instructed the jury before closing arguments (TTR.894-909; App.R). After closing arguments, the Court asked counsel if there was anything further to be placed on the record:

"The Court: Thank you, please be seated. Is there anything further we need to put on the record at this time, Mr. Royer?

Mr. Royer: Your Honor, we would renew our objection to the reasonably anticipated use —

The Court: All of your objections are preserved; you don't need to renew them at this time. If there's anything additional, we can take it up, but the record is protected for you on it.

Mr. Royer: Okay, thank you. No, there's nothing else.

The Court: Okay. Mr. Raney, anything further?

Mr. Raney: Your Honor, I haven't compared the new jury instruction with the old in terms of the comparative negaligence part that was changed, but I do understand you're reserving objections on that, on the changed part, and that's sufficient for my needs. We had asked for additional instructions from the Marzula case.

The Court: Oh, certainly. All the requests that you made previously, you're protected on those, so you don't need to renew that at this time.

Mr. Raney: All right, thank you."
(TTR.953, lines 4-25; App.S)

At no time before submission of the case to the jury did KREMCO make a Motion for Judgment as a Matter of Law citing any *reasons*, law or facts entitling it to such a judgment.

The jury answered the Jury Verdict Form (App.K) finding, among other things, "Mr. Hunter's death was caused by an unreasonably dangerous characteristic of the racking board during a reasonably anticipated use of that product." Pursuant to the jury verdict and the application of LA.C.C.

Art. 2324, the Court awarded the Hunters fifty (50%) percent of the total stipulated damages against KREMCO. Pursuant to stipulation, the District Court found that R. L. Long Company was insolvent and the Hunters had not received any compensation from R. L. Long Company who was not made a party to the lawsuit. The Hunters moved to alter or amend the judgment by disregarding the fault assessed to the non-parties, R. L. Long Company and Mosley Well Service, to award the Hunters approximately eighty-five (85%) percent of their total stipulated damages, but the motion was denied.

Following the jury verdict, KREMCO filed a pleading entitled Motion for Judgment as a Matter of Law alleging for the first time the verdict should be vacated because Hunter's death did not occur during a "reasonably anticipated use" of the racking board (App.E). KREMCO's Memorandum in Support of Motion for Judgment as a Matter of Law (App.F) further expounded on why the jury verdict should be vacated. Hunter filed an Opposition Memorandum (App.G), but the issue of waiver of KREMCO's Rule 50 Motion was not raised or discussed. KREMCO filed a Response Memorandum in Support of the Motion for Judgment as a Matter of Law (App.H). A Memorandum Ruling on KREMCO's Motion for Judgment as a Matter of Law denied KREMCO's Motion on the merits without questioning whether KREMCO waived the right to file the Motion (App.H).

The Hunters appealed the District Court's apportionment of damages against KREMCO. KREMCO cross-appealed contending numerous errors were committed, including the primary error that the racking board was not being subjected to a reasonably anticipated use by Mr. Hunter

when he was killed. At no place in KREMCO's Original or Reply Brief is Rule 50 cited, nor is there any statement that KREMCO did or did not waive its right to judgment as a matter of law under Rule 50. KREMCO did allege under the Statement of the Case at page 3 of the Original Brief:

> After a recess subsequent to the close of the Hunters' case in chief during which various issues were discussed, Kremco made a motion for a verdict as a matter of law which was denied by Magistrate Judge Payne. At the close of all of the evidence, Kremco again made such a motion, which was also denied.
>
> Shortly after judgment was rendered, Kremco renewed its motion by filing a written motion for judgment as a matter of law asserting various issues therein; Judge Payne again denied relief, ruling that such matters were jury questions and refusing to vacate the jury verdict."

On November 29, 1995, in a 2 to 1 decision, a panel of this Court reversed the jury verdict and held that, as a matter of law under Rule 50, a reasonable juror could not have reached the conclusion that the use of the racking board on the evening of the fatal accident was a use that was, or should have been, reasonably anticipated by KREMCO (App.B). *Hunter v. Knoll Rig & Equipment Mfg. Co., Ltd.*, 70 F.3d 803 (5th Cir.1995). As a predicate to granting KREMCO a Judgment as a Matter of Law under Rule 50, a majority panel of this Court stated:

> Post-verdict, ***
>
> As it had at the close of the Hunters' case and of all the evidence, KREMCO moved for judgment as a matter of

law on, *inter alia*, whether the accident occurrred, as required by LPLA, during a "reasonably anticipated use" of the racking board.

(THIS STATEMENT IS WRONG.)

On December 13, 1995, the Hunters filed a Petition for Rehearing and a Suggestion for Rehearing En Banc that addressed the perceived substantive factual and legal errors in the majority opinion. Counsel for the Hunters still did not question the Court's power or the procedural issue of waiver under Rule 50, and without questioning the erroneous statement of the majority panel, counsel for the Hunters repeated the error in the Suggestion for Rehearing En Banc under the Statement of the Course of Proceedings and Disposition of the Case, at page 3, as follows:

> At the close of Plaintiffs' case, and after all evidence had been admitted, KREMCO moved for judgment as a matter of law contending that Hunter's death was not caused during a "reasonably anticipated use" of the racking board, and that the racking board was not unreasonably dangerous. Each Motion was denied by the Magistrate.
>
> **(THIS IS AN ERRONEOUS STATEMENT.)**

The Petition for Rehearing and the Suggestion for Rehearing En Banc were denied on March 28, 1996 (App.A).

In anticipation of preparing an Application for Writ of Certiorari to be filed with the U.S. Supreme Court, following an exhaustive study of the trial transcript, the record (pleadings) filed in the Trial Court, and the Briefs of all parties that have been filed in this Court, along with an in depth study of the case law and treatises that discuss

Rule 50, about May 17, 1996, counsel for the Hunters discovered that KREMCO was not entitled to a Judgment under Rule 50 in this Court because KREMCO failed to specify any facts or law entitling it to such a judgment at the close of the Hunters' case, at the Jury Charge Conference, at the close of the evidence, or at any other time before submission of the case to the jury. On May 17, 1996, counsel for the Hunters filed a "Notice of Intent to Move to Void Judgment Granted Under F.R.C.P. 50 for Lack of Jurisdiction" that informed this Court and other counsel of record of the Hunters' discovery, and that pleadings would be filed within fourteen (14) days for consideration by the Court, en banc, unless ordered to proceed otherwise.

ARGUMENT AND AUTHORITIES

Fed.R.Civ.P. 50(a) (2) provides:

> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion **shall specify the judgment sought and the law and the facts** on which the moving party is entitled to the judgment. (emphasis added).

This Circuit discussed the consequences of noncompliance with the specificity requirement in *McCann v. Texas City Refining, Inc.*, 984 F.2d 667 (5th Cir.1993), at pages 672-673:

> "Rule 50(a) requires a motion for a directed verdict to state the specific grounds for granting the motion. See *Woods v. Sammisa Co.*, 873 F.2d 842, 853 (5th Cir.1989). A party may not base a motion for JNOV on a ground that was not included in a prior motion for a directed

verdict. 5A Moore's Federal Practice, supra, Paragraph 50.08. Yet at no point did Hill specifically object to the sufficiency of the plaintiffs' evidence on the issue of willfulness. . . . "It would be a constitutionally impermissible re-examination of the jury's verdict for the district court [or this Court] to enter judgment n.o.v. on a ground not raised in the motion for directed verdict." Sulmeyer v. Coca Cola Co., 515 F.2d 835, 946 n. 17 (5th Cir.1975), cert. denied, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976). *****

Since Hill did not actually move for a directed verdict on the issue of willfulness at the close of all the evidence—and consequently was not entitled to move for a JNOV on the issue—Hill's objection to the sufficiency of the plaintiffs' evidence on willfulness is being raised for the first time on appeal. It is the unwavering rule in this Circuit that issues raised for the first time on appeal are reviewed only for plain error. *Shipman v. Central Gulf Lines, Inc.*, 709 F.2d 383, 388 (5th Cir.1983). In other words, this Court will reverse only if the judgment complained of results in a "manifest miscarriage of justice." *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir.1978). Thus, the question before this Court is not whether there was substantial evidence to support the jury verdict, but whether there was any evidence to support the jury verdict. Id. Even if no evidence supports the verdict, **this Court lacks the power to enter judgment for the appellant.** (emphasis added). Instead, appellate relief is limited to ordering a new trial. *Hinojosa v. City of Terrell*, 834 F.2d 1223, 1228 (5th Cir.1988), cert. denied 493 U.S. 822, 110 S.Ct. 80, 107 L.Ed.2d 46 (1989); *Gorsalitz v. Olin Mathieson Chem. Corp.*, 429 F.2d 1033, 1028 (5th L.Ed.2d 807 (1972); see 5A Moore's Federal Practice, supra, Paragraph 50.05(1)."

Issue #1: Does this Court have the general jurisdiction to review the mandate to determine whether it should be recalled and voided for lack of power to grant KREMCO a judgment as a matter of law under Rule 50, and/or to prevent injustice?

The Hunters contend that this Court has general jurisdiction to recall the mandate under 5th Cir.R. 41.2 which provides "A mandate once issued shall not be recalled except to prevent injustice." The Hunters have been caused an injustice by the mandate issued by this Court. *In Re Incident Aboard the D/B Ocean King,* 877 F.2d 322 (5th Cir.1989). If 5th Cir.R. 41.2 is not the proper procedural and jurisdictional rule to follow, the Hunters contend that Fed.R.App.P. 47(b) and Fed.R.Civ.P. 60 (See e.g. *Pierce v. Cook & Co., Inc.,* 518 F.2d 720 (10th Cir.1975)) provide the general procedure and power for this Court to review the mandate.

Issue #2: Should this Court exercise its general jurisdiction to recall and void the mandate for lack of power to grant KREMCO a judgment as a matter of law under Fed.R.Civ.P. 50, and/or to prevent injustice?

MacArthur v. University of Tex. Health Center Tyler, 45 F.3d 890 (5th Cir.1995), at pages 896-897, enunciates the principles that must be followed by the Appellate Court to determine whether it has power under Rule 50:

> "Before addressing the question of the sufficiency of the evidence, however, we must address the procedural question of whether Painter waived his right to challenge the evidentiary support for the verdict when he failed to renew his motion for judgment as a matter of law at

the close of all evidence presented in this trial. In accordance with Rule 50(b) of the Federal Rules of Civil Procedure, it is well-settled that a motion for judgment as a matter of law must be renewed at the conclusion of trial in order to preserve the review of the sufficiency of the evidence on appeal. *McCann v. Texas City Refining, Inc.*, 984 F.2d 667, 671 (5th Cir.1993). In certain limited situations, however, we have excused technical non-compliance with Rule 50(b). See, e.g., *Davis v. First Nat. Bank*, 976 F.2d 944, 948 (5th Cir.1992), cert. denied, — U.S. —, 113 S.Ct., 2341, 124 L.Ed.2d 251 (1993) (Weiner, J.); *Merwine v. Board of Trustees for State Institutions*, 754 F.2d 631, 635 (5th Cir.1985), cert. denied, 474 U.S. 823, 106 S.Ct. 76, 88 L.Ed.2d 62 (1985). Whether technical non-compliance with Rule 50(b) precludes a challenge to the sufficiency of the evidence on appeal "should be examined in the light of the accomplishment of its particular purposes as well as in the general context of securing a fair trial for all concerned in the quest for truth." *Bohrer v. Hanes Corp.*, 715 F.2d 213, 217 (5th Cir. 1983), cert. denied, 465 U.S. 1026, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984). This rule serves two basic purposes: to enable the trial court to re-examine the sufficiency of the evidence as a matter of law if, after verdict, the court must address a motion for judgment as a matter of law, and to alert the opposing party to the insufficiency of his case before being submitted to the jury. *Bohrer*, 715 F.2d at 216. In *Bohrer*, like here, the court reserved ruling on a motion for directed verdict made at the close of the plaintiff's evidence. Id. at 217. The defendants then presented substantial evidence to which the plaintiffs presented no rebuttal testimony. Id. We excused the defendants' failure to make a motion at the conclusion of all the evidence because the purposes of the rule were satisfied. Id. We concluded that

> [t]o demand a slavish adherence to the procedural sequence and to require these defendants, in this case, to articulate the words of renewal once the motion had been taken under advisement, would be 'to succumb to a nominalism and a rigid trial scenario as equally at variance as ambush with the spirit of our rules.'
>
> *Bohrer,* 715 F.2d t 217 (quoting *Quinn v. Southwest Wood Prods., Inc.,* 597 F.2d 1018, 1025 (5th Cir.1979)).

Since the issue was not previously raised by any party, it is believed that this Court did not procedurally question whether KREMCO waived its right to seek review of the sufficiency of the evidence, or whether this Court had the power under Rule 50 to review the sufficiency of the evidence.

In hindsight, it is noteworthy that KREMCO did not specify any particular pre-verdict issues that were preserved for appeal under Rule 50, nor did KREMCO cite the particular pages of the transcript where it had specified any facts and law for judgment as a matter of law on any issue prior to the submission of the case to the jury. However, in its Original Brief, KREMCO challenged the sufficiency of the evidence on every issue that was decided by the jury against KREMCO. Additionally, KREMCO did not include in the Record Excerpts that were furnished to the Court the Motions that were made during the trial at the close of the Hunters' case and at the close of all the evidence, as would seem to be required by Fed.R.App.P. 30 and 5th Cir.R. 30.01.4 (f).

The Hunters respectfully submit that this Court, under

McCann and *MacArthur, supra,* had no power to render judgment under Rule 50 since KREMCO failed to cite any facts or law entitling it to judgment as a matter of law. The reason behind the rule, to give the opposing party notice of Movers' contentions and the opportunity to adduce additional evidence to refute those contentions, is the very reason an injustice has been suffered by the Hunters in this case. They were not advised, until *after* the jury verdict, that KREMCO considered their evidence on this issue to be insufficient.

CONCLUSION

The Hunters, through no fault of their own, have suffered an injustice as a result of the mandate issued by this Court. This Court had no power to issue the mandate. This Court should exercise its general jurisdiction to recall and void the mandate.

CERTIFICATE OF SERVICE OF ORIGINAL BRIEF

I certify that a copy of the Original Brief on Suggestion for Hearing En Banc on Motion to Recall Mandate and Void Judgment granted Under Fed.R.Civ.P. 50 for Lack of Power on Behalf of Plaintiffs' Appellants/Cross-Appellees, Ilene Thurman Hunter, et al, with attached Appendix of Original Brief on Suggestion for Hearing En Banc on Motion to Recall Mandate and Void Judgment granted Under Fed.R.Civ.P. 50 for Lack of Jurisdiction on Behalf of Plaintiffs-Appellants/Cross-Appelleees, Ilene Thurman Hunter, et al, was served on the following parties in these proceedings, by First Class United States Mail, properly addressed and postage prepaid on the 31st day of May, 1996:

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APPENDIX RC

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

NO. 94-40822

FILED
MAY 20 1996

ILENE THURMAN HUNTER, ET AL	PLAINTIFFS-APPELLANTS, CROSS-APPELLEES
VERSUS	
KNOLL RIG & EQUIPMENT MANUFACTURING CO., LTD.	DEFENDANTS-APPELLEES, CROSS-APPELLANTS

§ § § § § § § §

NOTICE OF INTENT TO MOVE TO VOID JUDGMENT GRANTED UNDER F.R.C.P. 50 FOR LACK OF JURISDICTION

NOW INTO COURT come Plaintiffs, Ilene Thurman Hunter, obo, Kathy Michelle Hunter, Claude Kenneth Hunter, Jr., Michael Christopher Hunter, and Melissa Ilene Hunter, and Donnovan Blaine Hunter, through undersigned counsel, who respectfully represent that undersigned counsel has discovered through research of the applicable law, and a thorough and detailed study of the record, transcript, briefs, and other pleadings of record in this civil

action, at the close of the Plaintiffs' case, the Defendants, Knoll Rig & Equipment Manufacturing Company, Inc., a Subsidiary of Draco Group of Companies, Ltd., and Fidelity & Casualty Company of New York, presented the following oral motion at page 532 of the trial transcript — "Yes, sir, we would move to dismiss at this time on a directed verdict, Your Honor." — and at the close of all the evidence, the Defendants presented the following oral motion at page 891 of the trial transcript — "Thank you. And we would re-urge our motion at this time for dismissal."; The Defendants did not specify any particular reasons for a judgment as a matter of law until a formal motion was filed after the jury granted a verdict and a judgment was entered by the District Court on the jury verdict; Having failed to assert specific reasons why they should be granted a judgment as a matter of law during the trial, the Defendants were not entitled to raise those issues in their Motion for Judgment as a Matter of Law after the jury returned the verdict, and this Court did not have the jurisdiction to grant the Defendants a judgment as a matter of law under F.R.C.P. 50, See *Sulmeyer v. Coca Cola Company,* 515 F.2d 835 (5th Cir.1975 at page 846), and *Sector Refining, Inc. v. Enterprise Refining Co.,* 771 F.2d 496 (T.E.C.A.1985 at pages 504-505); It is the intent of Plaintiffs, through undersigned counsel, to file a formal motion to void the Judgment entered herein by the Court of Appeals for lack of jurisdiction, along with a supporting Brief, within the next fourteen (14) days, for consideration by the Court, en banc, unless ordered to proceed otherwise by this Court.

Respectfully submitted,

R. LAYNE ROYER, LTD.

/s/ Layne Royer

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CERTIFICATE OF SERVICE

I certify that a copy of the Notice of Intent to Move to Void Judgment Granted Under F.R.C.P. 50 for Lack of Jurisdiction of Plaintiffs-Appellants/Cross-Appellees, Ilene Thurman Hunter, et al, was served on the following parties in these proceedings, by First Class United States Mail, properly addressed and postage prepaid on the 17th day of May, 1996:

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APPENDIX RD

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

RECEIVED
MAY 27 1994

FILED
MAY 27 1994

ILENE THURMAN HUNTER, ET AL	:	CIVIL ACTION NO. 91-0337
VERSUS	:	JUDGE STAGG
KNOLL RIG & EQUIPMENT MANUFACTURING CO., LTD.	:	MAGISTRATE PAYNE

MOTION FOR JUDGMENT AS A MATTER OF LAW

NOW INTO COURT, through undersigned counsel, comes **KNOLL RIG AND EQUIPMENT MANUFACTURING COMPANY, LTD, A SUBSIDIARY OF DRACO GROUP OF COMPANIES, LTD.**, defendant in the above entitled and numbered cause and respectfully show the following:

1.

The above matter was tried by civil jury during May 2-6, 1994, and a verdict was rendered by the jury on May 9, 1994. The Jury interrogatories and/or verdict form, along

with the judgment thereafter prepared by the Court, are contained in the record of this matter. Oral motions for judgment as a matter of law were made by KREMCO at the close of plaintiffs' case and at the close of all of the evidence.

2.

As a portion of its verdict, the jury determined that the accident at issue occurred during a "reasonably anticipated use" of the product in question. Kremco herein contends that this finding is manifestly erroneous as a matter of fact and law, and that such a conclusion could not have been correctly reached based upon the evidence adduced at trial.

3.

As a result of the foregoing, and as more fully explained in the memorandum supporting this motion, the verdict of the jury should be set aside; the Court should find that defendant's product was not being subjected to a "reasonably anticipated use" at the time of the accident, and defendant herein should thus be exonerated.

4.

Defendant reserves its right to assert other issues and/or arguments which may further be available to it in this Court or on appeal, including but not limited to matters relating to jury instructions, allocation of fault by the jury to Claude Hunter or others, calculation of the judgment, and all other matters.

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BY: /s/ Ronald E. Raney (CW5)

RONALD E. RANEY
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APPENDIX RE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

FILED
MAY 27 1994

ILENE THURMAN HUNTER, ET AL	:	CIVIL ACTION NO. 91-0337
VERSUS	:	JUDGE STAGG
KNOLL RIG & EQUIPMENT MANUFACTURING CO., LTD.	:	MAGISTRATE PAYNE

MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT AS A MATTER OF LAW

MAY IT PLEASE THE COURT:

The Court is well aware of the issues and evidence involved in this matter, which was recently tried beginning on May 2, 1994. While there may be other items which the parties will appeal at a later date, defendant herein raises a threshold issue which is of overriding importance.

Factual context

Defendant contends that the finding of the jury that

the product in question was being subjected to a "reasonably anticipated use" at the time of the accident in question is manifestly erroneous. This contention is based upon the following analysis.

As the court will recall, the accident occurred while the employees of Mosley Well Service, including Claude Hunter, were racking pipe (also sometimes referred to as tubing) in the racking board after removing it from the hole. Common sense, as well as normal industry practice, dictates that the pipe be leaned *away from the mast* — in that position, it is supported by the *frame* of the racking board, which is the strongest member, *not* by the rear handrail or related components.

The direction of the pipe was even more critical in this particular case due to modifications made to the racking board by the original purchaser, R.L. Long and Company (hereafter, Long). As was shown at trial, Long had changed the latching system used to retain the rear handrail — the latching system was modified by Long so that it was not as strong as the handrail itself.

Additionally, it was shown that such modifications by Long were unsafe and unnecessary. Other Kremco rigs originally sold to Long still had a latching system which was either the original Kremco design or of the same basic configuration (referring to the rigs owned by Donald Bowling in Canada, which were the subject of a stipulation by the parties in this respect).

Plaintiffs have continuously asserted that "tying the pipe to the rear handrail" is one of the main issues in this

case. In actuality, however, this is nothing more than a red herring.

As a practical matter, there is nothing dangerous about tying pipe to the rear handrail of Kremco's racking board as long as the pipe is leaned properly, i.e., away from the mast and against the frame — *in that position, the handrail is not, in any manner or to any degree, supporting the weight of the pipe.* Although several witnesses indicated that tying the pipe might prevent its movement under "high wind" conditions, there was no evidence adduced at trial that "high winds" (*which were not present at the time of the accident*) would be capable of exerting forces sufficient to cause a failure of any portion of the racking board as originally manufactured by Kremco.

Regardless of the merit (or more accurately, the lack thereof) of the foregoing false issue, and while the record has not yet been transcribed, the testimony of all of the Mosley witnesses, among others, clearly established their knowledge of the fact that leaning the pipe toward the mast is against industry practice, improper and dangerous. All of these witnesses testified that anyone with years of experience in the oilfield industry (of which Mr. Hunter had approximately twenty) would be aware of such.

With particularity, the Court should recall the testimony of Mosely employees Dan Ray and Charles Berry, and one of its co-owners, Tommy Mosley. These can be briefly paraphrased as follows (since the testimony cannot be reviewed at this time, the following has been taken from trial notes and recollection — any error as to specific words or phrases is unintended).

Mr. Ray acknowledged that leaning the pipe toward the mast was improper and unsafe, and that the rear handrail was not meant to be subjected to such. He further stated that engaging in such a practice could subject portions of the racking board, including the rear handrail assembly, to stresses or forces for which they were not meant. The testimony of Mr. Berry was highly similar, except that he attempted to assert the foregoing "high winds" argument for which no evidence was ever asserted.

Tommy Mosley likewise asserted the impropriety of leaning the pipe toward the mast. More importantly, however, Mr. Mosley went even further and expressly stated that he knew the rear handrail (which, as stated above, had been subjected to inappropriate and unnecessary modifications by the R.L. Long Company) would come forward if it was subjected to the pipe being leaned in such a manner.

In addition to the Mosley witnesses, the Court heard the testimony of Ralph Busse (defendant's expert), and Jack Reeve (an expert deposed by plaintiffs prior to trial whose deposition was offered by defendant). *These two witnesses were the only ones who had ever designed a racking board* — both testified that they would never have anticipated that a user would allow pipe to lean toward the mast. Defendant does not recall any testimony on the aspect of design which contradicted this position.

Some of the witnesses who testified on behalf of plaintiffs attempted to assert that, in some situations, the pipe is leaned toward the mast merely in order to "get it all in the racking board". It was shown at trial, however, through the testimony of Mr. Mosley and others, that when the pipe

can no longer be racked properly, it should be "layed down" (either on the ground or on a separate pipe rack which is itself located on ground level).

Furthermore, it was conclusively shown, by photographs taken immediately after the occurrence, that there was equipment on-site at the time of the accident (a forklift and a catwalk) which could have been used to lay the pipe down. Even plaintiffs' witnesses who testified on this issue admitted that the decision as to whether to "lay down" is solely a matter of convenience — i.e., laying the pipe down is less convenient, since the process is more time consuming. The jurisprudence discussed infra clearly shows that a use which is merely more convenient, yet is nonetheless shown to be unsafe and improper, cannot as a matter of law suffice to meet the test of a "reasonably anticipated use". Under the circumstances described above, Kremco should not be held liable.

As stated elsewhere, it is important for the court to remember that, *as admitted by plaintiffs' own experts during the trial, the rear handrail itself did not experience a physical failure* — rather, the latches manufactured and installed by Long are what failed, allowing the handrail to come forward. For that matter, and as also admitted by plaintiffs' experts, *no part of the rig manufactured by Kremco experienced a physical failure which resulted in Mr. Hunter's death.*

Discussion of facts and law

In the context of the aforementioned facts, two recent cases from the Louisiana jurisprudence are pertinent. These are *Lockart v. Kobe Steel,* 989 F.2d 864 (5th Cir. 1993), and

Daigle v. Audi of America, Inc., 598 So.2d 1304 (La. App. 3rd Cir. 1992), writ denied.

As the court in *Lockart* held, citing *Daigle,* the concept of "reasonably anticipated use" under the Louisiana Products Liability Act is narrower than the prior jurisprudential concept of a mere "normal use" (which included "foreseeable misuse"); see *Lockart* at 867. Thus, any argument that Kremco should be liable based upon mere "foreseeable misuse" would be insupportable.

Lockart, however, is important not only because of the above pronouncement of law, but equally so in view of its own factual context. In that case, the plaintiff and his co-employees were operating an item of heavy construction equipment known as an "excavator", which utilized a "bucket" on the front — the bucket had a series of "teeth" on it which could be used for various purposes. Plaintiff was injured after suspending an item from the teeth of the bucket and then working under it.

The manufacturer of the equipment had included a warning which specifically indicated that the use of the bucket in this manner was improper. Attached hereto is a copy of the pictorial which the manufacturer used in this regard.

In the present case, of course, no warning by Kremco was necessary or required. Not only were the Mosley employees, including Mr. Hunter, already aware of the danger, but said danger was obvious; see LSA-R.S. 9:2800.57. Furthermore, and in any event, Mosley itself, even if based solely upon the testimony of Tommy Mosley as described above, was certainly aware. The law is clear that where an

employer is a sophisticated purchaser or user who is already deemed aware of the danger, the manufacturer need not give a warning of its own and can rely upon said employer to convey such to his employees; *Davis v. Avondale Industries, Inc.*, 975 F.2d 169 (5th Cir. 1992).

Lockart is thus important because the court found that plaintiff's *method* of using the bucket did not constitute a reasonably anticipated use. This Court should note that the bucket in *Lockart* was indeed capable of safely supporting a load of the type which had been attached to it (just as Kremco's racking board is capable of safely racking and holding pipe) — however, *the bucket was not intended to support such loads in the manner in which plaintiff and his co-workers were attempting at the time of the occurrence.* The plaintiff and his co-workers may have felt that this manner of using the product was more convenient or less time consuming, or perhaps they rationalized their actions on some other basis — the Fifth Circuit, however, would not allow that manner of use, regardless of the underlying motivation, to be classified as reasonably anticiapted.

Similarly, in *Daigle,* the state appellate court held that it was not a reasonably anticipated use for the plaintiff, who was inspecting a vehicle for possible purchase, to insert his hand inside an area of the vehicle into which he could not see, especially while the motor was running. Thus, although the inspection of a vehicle would certainly be an anticipated use under other circumstances, such became "not reasonably anticipated" due to the manner in which that particular inspection was being attempted. Again, the plaintiff in *Daigle* may have felt it was more convenient to attempt to inspect the vehicle with the engine running, but such simply could

not rise to the level of a reasonably anticipated use.

These cases make it absolutely clear that "any foreseeable use" of a product does not thereby equate to one which can legally be accepted as "reasonably anticipated". For instance, one may attempt to drive a car at high speed on a wet, sharply curved roadway at night without headlights, but merely because the car is "being driven" does not mean that "all driving activities" must be reasonably anticipated by the manufacturer.

Similarly, merely because Kremco's racking board is designed to "rack pipe" does not mean that "all pipe racking activities" must automatically have been reasonably anticipated. *Lockart* and *Daigle* stand for the proposition that a use which is undertaken in violation of common sense or industry practice, and/or with knowledge of impropriety or danger, clearly cannot be considered as reasonably anticipated.

Conclusion

Based upon the testimomy of his own co-workers and superiors (as well as others) at trial, Mr. Hunter and his crew were not engaged in a "reasonably anticipated use" of the product at the time of this accident. The evidence is clear that the act of leaning the pipe toward the mast was known by all concerned to be improper, unsafe, and against the practices of the industry as well as of Mosley Well Service.

As a result, the verdict of the jury should be vacated

and judgment should be entered in favor of Kremco.

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CERTIFICATE

I HERBY CERTIFY that a copy of the above and foregoing document has this day been forwarded to all counsel, by placing same in the United States mail, properly addressed, with adequate postage paid thereon.

Shreveport, Louisiana this 27th day of May, 1994.

/s/ Ronald E. Raney

OF COUNSEL